

CLERK'S COPY.

164

TRANSCRIPT OF RECORD

469281
H. C.

Supreme Court of the United States

OCTOBER TERM, 1941

No. 86

PETER YOUNG, ALIAS YOUNG LUP, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 15, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

NO. 9436

United States
Circuit Court of Appeals

For the Ninth Circuit.

PETER YOUNG, alias YOUNG LUP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United
States for the Territory of Hawaii.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD**

For the Plaintiff, The United States of America,

INGRAM M. STAINBACK, Esq.,

United States Attorney, and

WILLSON C. MOORE, Esq.,

Assistant United States Attorney,

Federal Building, Honolulu, T. H.

For the Defendant, Peter Young alias. Young Lup,

JOSEPH V. ESPOSITO, Esq.,

306 McCandless Building,

Honolulu, T. H. and

HIRAM L. FONG,

77 Merchant St.,

Honolulu, T. H. [1~]

Peter Young vs.

[Title of District Court and Cause.]

CLERK'S STATEMENT

Time of Commencing Suit

August 10, 1939—Indictment filed.

Names of Original Parties:

United States of America, Plaintiff.

Peter Young alias Young-Lup, Defendant.

Dates of Filing Pleadings:

August 10, 1939—Indictment filed.

Times When Proceedings Were Had:

August 10, 1939—Indictment filed.

August 14, 1939—Arraignment waived; continuance for plea.

August 21, 1939—Continuance.

August 28, 1939—Plea of Not Guilty—set for trial.

September 12, 1939—Trial—motion for directed verdict.

September 13, 1939—Further trial.

September 14, 1939—Further trial—verdict.

September 21, 1939—Hearing on motion for new trial—sentence.

November 15, 1939—Order allowing appeal signed.

December 4, 1939—Bill of Exceptions allowed.

Proceedings in the above entitled matter were had before the Honorable D. E. Metzger, Judge, United States District Court, Territory of Hawaii.

Dates of Filing Appeal Documents:

September 22, 1939—Notice of Appeal—Cost Bond—Bond.

September 30, 1939—Order of Court, in re Assignment of Reasons of objections and exceptions.

November 15, 1939—Petition for Appeal—Assignments of Error—Citation—Praecipe for Transcript of Record—Notice of Filing of Bill of Exceptions—Bill of Exceptions—Notice of Hearing on Settlement of Bill.

December 5, 1939—Order Settling Bill of Exceptions. [3]

**CERTIFICATE OF CLERK TO THE
ABOVE STATEMENT**

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties, the dates when the respective pleadings were filed; the times when proceedings were had; the name of the judge presiding; and the dates when appeal pleadings were filed and issued in the above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of January, A. D. 1940.

[Seal]

WM. F. THOMPSON, JR.,
Clerk. [4]

In the United States District Court for the
Territory of Hawaii

April 1939 Term

Cr. No. 9224

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER YOUNG alias YOUNG LUP,

Defendant.

INDICTMENT

Counts I to X inclusive: violations of Sections 1041
& 1047, Title 26, United States Code [5]

[Title of District Court.]

The United States of America,
District of Hawaii—ss.

Count I.

The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup, (hereinafter called the Defendant), a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than two grains of opium in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937 to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away four (4) pints, two (2) ounces, and 305 minims of a preparation and remedy which did not contain more than two grains of opium in one fluid ounce, to-wit: tincture of opium, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such tincture of opium which had been sold, distributed, dispensed and given away by said [6] defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose; contrary to the form of the stat-

ute in such case made and provided and against the peace and dignity of the United States of America.

Count II.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup, (hereinafter called the Defendant), a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than one grain of codeine in one avoirdupois ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accesible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937 to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away one thousand (1,000) quarter ($\frac{1}{4}$) grain tablets of a preparation and remedy which did not contain more than one grain of codeine in one avoirdupois ounce, to-wit: Analgesic No. 1, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales,

ex- [7] changes and gifts of said amount of such Analgesic. No. 1 Tablets which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count III.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup, hereinafter called the Defendant, a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than two grains of opium in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu,

Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away seventy-two (72) gallons and four (4) pints of a preparation and remedy which did not contain more than two grains of opium in one fluid ounce, to-wit: paregoric, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such paregoric which had been [8] sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count IV.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young, alias Young Lup, hereinafter called the defendant, a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than one grain of codeine in one fluid ounce in the course of his professional practice, provided that he keeps a

record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii and within the jurisdiction of this Court, did sell, distribute, dispense and give away sixteen (16) gallons and two (2) pints of a preparation and remedy which did not contain [9] more than one grain of codeine in one fluid ounce, to-wit: Linctus Compound, and that said defendant did knowingly, wilfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such Linctus Compound, which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count V.

And the Grand Jurors of the United States, empaneled, sworn and charged at the Term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup.

hereinafter called the defendant, a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than one grain of codeine in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii and within the jurisdiction of this Court, did sell, distribute, dispense and give away two (2) gallons and one (1) quart of a preparation and remedy which did not contain more than one grain of codeine in one fluid ounce, to-wit: Codeine Phosphate, [10] and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such Codeine Phosphate which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose: contrary to the form of the statute in such case made

and provided and against the peace and dignity of the United States of America.

Count VI.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup,

hereinafter called the defendant, a physician, who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than one grain of codeine in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away five (5) gallons and twenty-eight (28) ounces of a preparation which did not contain more than one grain of codeine [11] in one fluid ounce, to-wit: sedatole, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such sedatole which had been sold, dis-

tributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count VII.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup, hereinafter called the Defendant, a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than two grains of opium in one avoirdupois ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away thirteen hundred seventy-one [12]

(1371) one quarter ($\frac{1}{4}$) grain tablets of a preparation and remedy which did not contain more than two grains of opium in one avoirdupois ounce, to-wit: Camsalide Tablets, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such Camsalide Tablets which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America:

Count VIII.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup, hereinafter called the defendant, a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than two grains of opium in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years

in such a way as to be readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense [13] and give away eight (8) gallons and two (2) quarts of a preparation and remedy which did not contain more than two grains of opium in one fluid ounce, to-wit: Stokes Expectorant, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such Stokes Expectorant which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose: contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count IX.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup, hereinafter called the defendant, a physician who had duly registered and paid his special tax, as re-

quired by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than one-quarter ($\frac{1}{4}$) grain of morphine in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, [14] 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away two (2) gallons and eight (8) ounces of a preparation and remedy which did not contain more than one-quarter ($\frac{1}{4}$) grain of morphine in one fluid ounce, to-wit: Syrup Eucillana Compound, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such Syrup Eucillana Compound which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count X.

And the Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid of the Court aforesaid, on their oath present that:

Peter Young alias Young Lup, hereinafter called the defendant, a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than one-quarter ($\frac{1}{4}$) grain of morphine in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any [15] officer, agent or employe of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away three (3) gallons and one (1) quart and twenty-eight (28) ounces of a preparation and remedy which did not contain more than one-quarter ($\frac{1}{4}$) grain of morphine in one fluid ounce, to-wit: Expectorant No. 6, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such Expectorant No. 6 which had been sold, distributed, dispensed and

given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employe of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(Signed) WILLSON C. MOORE,
Acting United States Attorney,
District of Hawaii.

A True Bill

(Signed) JOHN A. CORBETT,
Foreman. [16]

Aug. 10, 1939

A true bill.

(Signed) JOHN A. CORBETT
Foreman

(Signed) WILLSON C. MOORE
WILLSON C. MOORE

Acting United States Attorney
District of Hawaii

I hereby order a Bench Warrant to issue forthwith on the within Indictment for the arrest of the defendant therein named, bail hereby being fixed at \$1,500.00.

(Signed) S. C. HUBER

Judge, U. S. District Court for the
Territory of Hawaii

[Endorsed]: Filed Aug. 10, 1939. [5]

**PROCEEDINGS, INDICTMENT FILED,
BENCH WARRANT ORDERED ISSUED,
BOND FIXED.**

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, August 10, 1939

[Title of District Court and Cause.]

The Grand Jury appeared in a body and, through their foreman Mr. John A. Corbett, in the presence of Mr. Willson C. Moore, Acting United States District Attorney, presented to the Court an indictment marked "True Bill" charging the above named defendant with the violation of Sections 1041 and 1047 Title 26, United States Code. The Court ordered that the indictment be placed on file. Upon motion of Mr. Moore, the Court directed the issuance of a Bench Warrant forthwith and fixed the amount of bond at \$1500.00. [17]

**PROCEEDINGS, ARRAIGNMENT WAIVED,
CONTINUED FOR PLEA**

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, August 14, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came the defendant without counsel. This case was called for ar-

raignment. The defendant waived the reading of the indictment, consenting that the charge be entered in the words thereof. The defendant stated he had no counsel. The Court ordered that this case be continued to August 21, 1939, at 9 a. m. for plea.

[18]

CONTINUANCE

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, August 21, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came the defendant with Mr. Joseph V. Esposito, his counsel. This case was called for plea. Mr. Esposito gave notice of his intention to file a demurrer. Mr. Moore asked that the demurrer be filed within forty-eight hours. Mr. Esposito entered an objection to this and asked that he be allowed one week within which to file a demurrer. The Court ordered that the demurrer be filed by Friday, August 25, 1939. [19]

**PROCEEDINGS AT PLEA,
CASE SET FOR TRIAL**

From the Minutes of the United States District
Court for the Territory of Hawaii
Monday, August 28, 1939

[Title of District Court and Cause.]

On this day came the United States of America by its Assistant United States Attorney, Mr. Willson C. Moore and also came the defendant with his counsel, Mr. J. V. Esposito, and this case was called for plea. Thereafter the defendant having entered a plea of not guilty to the charge in the Indictment, the Court ordered that the case be set for trial on Monday, September 11, 1939, at 9 a. m. [20]

**PROCEEDINGS AT TRIAL, CONTINUANCE
FOR FURTHER TRIAL, MOTION FOR
DIRECTED VERDICT OF NOT GUILTY**

From the Minutes of the United States District
Court for the Territory of Hawaii
Tuesday, September 12, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came the defendant with Mr. J. V. Esposito, his counsel. This case was called for trial. Both sides being ready for trial the trial of this case proceeded as follows. Upon

motion of Mr. Moore an order of nolle prosequi was entered as to the first and second counts of the indictment. The following jurors were empaneled and sworn to try the issues herein: Jens J. C. Schultz, Robert M. Cunningham, Wm. S. K. Brandt, Charles L. C. Galt, Joel M. Brooks, George D. Center, Wm. H. D. King, Glen Emerick, Eugene T. C. Yap, Louis V. Cadinha, Howard C. Babbitt and Robert E. White. Mr. Moore made the opening statement and read the indictment to the jury. The opening statement of the defense was reserved. It was stipulated by respective counsel that if the following druggists and purveyors of drugs were called they would show from records in their possession that certain drugs were purchased on certain dates by Dr. Peter Young from McKesson, Langley & Michaels; Hospital Purveyors; T. H. Davies & Co., Ltd.; Stewart's Fort Street Pharmacy; American Factors, Ltd.; Upjohn & Company, San Francisco, and Honolulu Medical Supply Company, the amounts and dates being read into the record. It was further stipulated that if the druggists were called they would testify with reference to the narcotic content in each preparation, said narcotic content being stated by Mr. Moore. Fred C. Barthelmess, Narcotic [21] Agent, was called and sworn and testified on behalf of the United States. U. S. Exhibits No. 1, Regulation No. 5, U. S. Treasury Department, Article 185, page 79, was admitted in evidence over the objection of the defense. U. S. Exhibit No. 2, letter dated July 24, 1939, Dr. Peter Young to C. T. Stevenson, was ad-

mitted in evidence, marked and ordered filed. The prosecution rested. Mr. Esposito moved that a directed verdict of not guilty be entered and that the defendant be discharged and the indictment dismissed. Mr. Esposito moved that the jury be excused for the purpose of argument on authorities. The Court excused the jury to Wednesday, September 13, 1939, at 10 a. m. The court was recessed to 1:30 p. m. this day for argument. At 1:30 p. m. in chambers, Mr. Moore and Mr. Esposito being present, argument was had on the motion to dismiss.

[22]

PROCEEDINGS AT FURTHER TRIAL, CONTINUANCE FOR FURTHER TRIAL, MOTION FOR DIRECTED VERDICT DENIED

From the Minutes of the United States District Court for the Territory of Hawaii

Wednesday, September 13, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came the defendant with Mr. J. V. Esposito, his counsel. This case was called for further trial. It was stipulated that the jury heretofore empaneled and sworn to try the issues herein was present. The motion for directed verdict heretofore entered by Mr. Esposito was denied. Mr. Esposito noted an exception. Peter Young was called and sworn and testified on his own be-

half. Defendant's Exhibit "A", record book, showing purchases and office expenses, beginning January, 1939, was admitted in evidence, marked and ordered filed. Defendant's Exhibit "B", receipts and vouchers, Hospital Purveyors, Ltd., for drugs purchased, was admitted in evidence, marked and ordered filed. Defendant's Exhibit "C", receipts and vouchers, Stewart's Fort Street Pharmacy, for drugs purchased, was admitted in evidence, marked and ordered filed. Defendant's Exhibit "D", receipts and vouchers, drugs purchased from T. H. Davies & Co., Ltd., was admitted in evidence, marked and ordered filed. Defendant's Exhibit "E", receipts and vouchers for drugs purchased Honolulu Medical Supply Company, was admitted in evidence, marked [23] and ordered filed. Defendant's Exhibit "F", receipts and vouchers for drugs purchased from Upjohn Company, San Francisco, was admitted in evidence, marked and ordered filed. Defendant's Exhibit "G", receipts and vouchers for drugs purchased from S. E. Massengill Company, San Francisco, was admitted in evidence, marked and ordered filed. Defendant's Exhibit "H", receipts and vouchers for drugs purchased from Lam's Pharmacy, was admitted in evidence, marked and ordered filed. Defendant's Exhibit "I", receipts and vouchers for drugs purchased from McKesson and Robbins, Inc., was admitted in evidence, marked and ordered filed. Defendant's Exhibit "J", receipts and vouchers, drugs purchased from American Factors, Ltd., was admitted in evidence, marked

and ordered filed. Defendant's Exhibit "K", stock record book, purchases, various accounts, was admitted in evidence, marked and ordered filed. The defense rested. The prosecution rested. Mr. Esposito renewed his motion for a directed verdict. The motion was denied and an exception noted. Mr. Moore asked that the case be reopened for the purpose of offering an exhibit in evidence. There being no objection by Mr. Esposito the motion was allowed, and the case re-opened. U. S. Exhibit No. 3, record marked drugs dispensed, was admitted in evidence, marked and ordered filed. The Court excused the jury to Thursday, September 14, 1939, at 9 a. m. The jury was further admonished as to discussing the case. The Court ordered that this case would be continued to 1:30 p. m. for the purpose of settling instructions. At 1:30 p. m., the Court and respective counsel being present, instructions were settled. [24]

PROCEEDINGS AT FURTHER TRIAL, VERDICT

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, September 14, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came the defendant with Mr. J. V. Esposito his counsel. This case

was called for further trial. It was stipulated the jury heretofore empaneled and sworn to try the issues herein was present. Argument was had by Mr. Moore to the jury. At 9:15 a. m. argument was had by Mr. Esposito. At 9:52 a. m. argument on rebuttal was had by Mr. Moore. At 10:02 a. m. the Court instructed the jury. Mr. Esposito entered the following exception: "At this time the defendant, if Your Honor please, takes exception to the Court giving over the objection of the defendant the Government's requested instructions numbered 3-A, 4, 5, 6, 7 to the jury in its instructions and charge. Also, the defendant takes exception to the Court's decision in refusing to give the jury in its charge and instructions the defendant's requested instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 23 and 25." At 10:30 a. m. a bailiff was sworn to take charge of the jury during its deliberation and the jury retired to deliberate upon a verdict. At 10:50 a. m. upon request of the jury the indictment and instructions were delivered to the jury by the order of the Court. At 12:05 p. m. the jury, through its foreman, Mr. Robert E. White, returned the following verdict: [25]

Criminal No. 9224

"THE UNITED STATES OF AMERICA,

vs.

PETER YOUNG ALIAS YOUNG LUP.

VERDICT

We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find as follows: Peter Young alias Young Lup,

Of Count Three	Guilty
Of Count Four	Guilty
Of Count Five	Guilty
Of Count Six	Guilty
Of Count Seven	Guilty
Of Count Eight	Guilty
Of Count Nine	Guilty
Of Count Ten	Guilty

of the Indictment heretofore filed herein.

Dated: Honolulu T. H., this 14th day of September, 1939.

(Signed) ROBERT E. WHITE,

Foreman."

Mr. Esposito entered an exception to the verdict and gave notice of his intention to file a motion for new trial. The jurors were excused until called. The matter of sentence was continued to Thursday, September 21, 1939, at 9 a. m. [26]

PROCEEDINGS AT HEARING ON MOTION
FOR NEW TRIAL; SENTENCE

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, September 21, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came the defendant with Mr. J. V. Esposito, his counsel. This case was called for hearing on a motion for new trial. Argument was had by Mr. Esposito on the motion for new trial. The Court denied the motion for new trial. Mr. Esposito entered an exception to the Court's ruling. Mr. Esposito requested that the name of Mr. Hiram Fong be entered at this time as associate counsel for the defendant. The request was granted. The Court then took up the matter of sentence. Mr. Moore made a statement of fact. Mr. Moore recommended that as to the third count the defendant be confined in Oahu Prison for two years and that he pay a fine of \$2,500.00, execution of the sentence of imprisonment to be suspended and the defendant placed on probation for five years under rule 131 of this Court, a condition of probation being that the defendant pay the fine imposed herein; that as to the remaining counts sentence be suspended and the defendant placed on probation for five years under rule 131 of this court, conditioned on the payment of the fine imposed herein. Mr. Esposito made a plea on behalf of the defendant.

The Court ordered that as to the third count of the indictment the defendant pay a fine of \$2,000.00, and that he be [27] imprisoned in Oahu Prison for two years, execution of the sentence of imprisonment to be suspended and the defendant placed on probation for five years under rule 131 of this court, a condition of probation being that the defendant pay the fine imposed herein; that as to the remaining counts imposition of sentence be suspended and the defendant placed on probation under rule 131 of this court for five years, a condition of probation being that the defendant pay the fine imposed herein. The Court ordered that the Narcotic officers who are authorized probation officers of this court shall be the defendant's probation officers. Mr. Esposito noted an exception to the appointment of the Narcotic officers as probation officers. The judgment of the Court reads as follows:

No. 9224

Criminal Indictment in 10 counts for violation
of U. S. C., Title 26, Secs. 1041 & 1047.

“UNITED STATES

v.

PETER YOUNG alias YOUNG LUP.

JUDGMENT

“On this 21st day of September, 1939, came the United States Attorney, and the defendant Peter Young alias Young Lup appearing in

proper person, and with counsel, J. V. Esposito, and,

“The defendant having been convicted by a verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: failure to keep narcotic records; (Verdict of Guilty as to Counts III to X inclusive, a nolle prosequi having been entered as to Counts I and II of said Indictment), and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court [28]

“Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby sentenced as follows: As to Count III of said Indictment the defendant is hereby fined the sum of Two Thousand Dollars (\$2,000.00) and he is also sentenced to serve two (2) years in Oahu Prison at Honolulu, T. H. or such other place of confinement as the Attorney General or his authorized representative may designate; the execution of the prison sentence as to said Count III is suspended and the imposition of sentence as to Counts IV to X inclusive is suspended and the defendant is hereby placed on probation for a period of five years, under Rule 131 of this Court, all of said probation being further conditioned upon payment of the fine imposed as to said Count III.

"It is further ordered that the Narcotic Officers who are authorized probation officers of this Court shall be the defendant's probation officers.

"It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) D. E. METZGER,

Judge."

Mr. Esposito entered an exception to the judgment and sentence. Mr. Esposito gave notice of the defendant's intention to appeal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California. Supersedeas bond was fixed at \$2,500.00. Mr. Esposito stated that a written notice of appeal would be filed this day. [29]

**PROCEEDINGS, ORDER ALLOWING APPEAL
SIGNED, APPEAL PLEADINGS FILED**

From the Minutes of the United States District
Court for the Territory of Hawaii

Wednesday, November 15, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came Mr. J. V. Esposito, counsel for the defendant:

Mr. Esposito presented the petition for appeal and order allowing appeal. The order allowing appeal was signed by the Court and ordered filed.

The following pleadings were presented and ordered filed: Assignment of Errors, Notice of Filing of Bill of Exceptions, Praecipe for Transcript, Notice of hearing on settlement of Bill of Exceptions and Bill of Exceptions. The citation was signed and ordered issued. [30]

PROCEEDINGS AT SETTLEMENT OF BILL OF EXCEPTIONS

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, December 4, 1939

[Title of District Court and Cause.]

On this day came Mr. Willson C. Moore, Assistant United States Attorney, and also came Mr. J. V. Esposito and Mr. H. L. Fong, counsel for the defendant herein. This case was called for the purpose of settling the bill of exceptions herein.

Mr. Moore stated that he had no objections to the acceptance of the bill of exceptions. The order settling bill of exceptions was presented to the Court. The Court ordered that said order be rewritten and submitted for signature. [31]

INSTRUCTION NO. A-1**Given**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 114.] [34]

INSTRUCTION NO. 2**Given**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 114.] [35]

INSTRUCTION NO. 22**Given**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 115.] [36]

INSTRUCTION NO. 3**Given**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 116.] [37]

INSTRUCTION NO. 19**Given.**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 116.] [38]

INSTRUCTION NO. 4

Given, over objection

[This instruction given, over objection as proposed and is set forth in the Bill of Exceptions at page 117.] [39]

INSTRUCTION NO. 5

You are instructed that Article 185, Regulations No. 5, of the U. S. Treasury Department, Bureau of Narcotics, provides "Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations* (in this case (~~Analgesic No. 1~~) [D.E.M.] Paregoric, Linctus Compound, Syrup-Codeine Phosphate, Sedatole, Camsalide Tablets, Stokes Expectorant, Syrup Eucillana Compound, and Expectorant #6) shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery". The form of these records shall give (1) the date, (2) ~~registration number of recipient,~~ (3) name of recipient, (4) address, (5) name of preparation, and (6) the quantity.

*This parenthesis added.

Given, over objection [40]

INSTRUCTION NO. 9

Given

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 118.] [41]

INSTRUCTION NO. 18**Given**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 119.] [42]

INSTRUCTION NO. 6**Given, over objection**

[This instruction given, over objection as proposed and is set forth in the Bill of Exceptions at page 120.] [43]

INSTRUCTION NO. 7**Given, over objection**

[This instruction given, over objection as proposed and is set forth in the Bill of Exceptions at page 121.] [44]

INSTRUCTION NO. 3-A**Given**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 121.] [45]

INSTRUCTION NO. 8**Given**

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 121.] [46]

INSTRUCTION NO. 9

Given

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 122.] [47]

INSTRUCTION NO. 21

Given

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 123.] [48]

INSTRUCTION NO. 24

Given

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 123.] [49]

INSTRUCTION NO. 11

Given

[This instruction given as proposed and is set forth in the Bill of Exceptions at page 124.] [50]

[Title of District Court and Cause.]

**REQUESTED INSTRUCTIONS ON
BEHALF OF DEFENDANT**

Peter Young, alias Young Lup, defendant above named, requests this Honorable Court to give to the

jury in the above entitled court and cause, the following instructions numbered from 1 to 25 inclusive.

Dated: Honolulu, T. H., this 13th day of September, 1939.

PETER YOUNG alias
YOUNG LUP,

Defendant,

By (Signed) J. V. ESPOSITO,

His Attorney. [52]

INSTRUCTION NO. 1

Gentlemen of the Jury, I instruct you to find the defendant not guilty as charged on all the Counts of the Indictment.

Refused [53]

INSTRUCTION NO. 2

I instruct you, that the Act of December 17, 1914, as amended, and known as the "Harrison Anti-narcotic Act", is an Act passed by Congress to enforce a tax or revenue upon "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium, or coca leaves, or any compound, manufacture, salt, derivative or preparation thereof, shall register with the collector of internal revenue of the district, his

name or style, place of business and place or places where such business is to be carried on and pay the special taxes hereinafter provided:—", that Sect. 6 of said Act is as follows:

"That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them; **PROVIDED**, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: **PROVIDED FURTHER**, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned, in this section lawfully entitled to manufacture, produce, compound or vend such preparations and remedies shall keep a record of all

sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act he shall pay a special tax of [54] \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine."

Refused over objection [55]

INSTRUCTION NO. 3

I instruct you that Sect. 2 of said Act is as follows:

"Section 2 (a) To the dispensing or distribution of any of the aforesaid drugs to a patient

by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: PROVIDED, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act."

Refused [56]

INSTRUCTION NO. 4

I instruct you that Article 179 of the U. S. Treasury Department, Bureau of Narcotics, Regulations No. 5, Relating to the Importation, Manufacture, Production, Compounding, Sale, Dealing in, dispensing and Giving of Opium or Coca Leaves, or any Compound, manufacture, salt, derivative or preparation thereof passed by H. J. Anslinger, Commissioner of Narcotics, Guy T. Helvering, Commissioner of Internal Revenue, Approved, June 1, 1938,

by Wayne C. Taylor, Acting Secretary of the Treasury, provides as follows:

"Art. 179. Stock preparations—A practitioner who, in his office practice, administers minute quantities of narcotics in stock preparations, may keep, as to such preparations, in lieu of the record required by Art. 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted."

Refused over objection [57]

INSTRUCTION NO. 5

I instruct you that Article 180 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

"Art. 180. Extent of Exemption.—The section of the law last quoted has the effect of conditionally exempting from liability under the other sections of the act persons manufacturing and dealing in certain narcotic preparations or remedies. Such persons are, however, subject to certain requirements laid down in section 6. Manufacturers of and dealers in exempt preparations are required to register as such whether liable to tax in that capacity or not. (See Art. 13 as to tax liability.)"

"Preparations containing cocaine or pantopon in any quantity, whether for internal or ex-

ternal use, are not within section 6 but are subject to all other provisions of the act."

Refused over objection. [58]

INSTRUCTION NO. 6

I instruct you that Article 181 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

"Art. 181. Standards of exemption.—Preparations designed for or capable of internal use to be exempt shall not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce. The preparation shall contain active medicinal drugs other than narcotics in sufficient proportion to confer upon the preparation valuable medicinal qualities other than those possessed by the narcotic drug alone. Use for aural, nasal, ocular, rectal, urethral, or vaginal purposes is not regarded as external use and, therefore, preparations manufactured or used for such purposes containing more than the percentages of narcotic drugs as above indicated are not within the exemption.

"There is no limitation upon the percentage of narcotic drugs external preparations may contain. In order to be within the exemption a preparation for external use, containing more than the maximum percentage of narcotic drugs above specified, shall contain ingredients rendering it unfit for internal administration."

Refused, over objection [59]

INSTRUCTION NO. 7

I instruct you that Article 182 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

"Art. 182. Restrictions on dispositions.—A preparation conforming to the standards set out in Article 181 is exempt from stamp tax and the requirements pertaining to taxable narcotics only, when manufactured, sold, distributed, given away, dispensed, or possessed as a medicine. A manufacturer may produce and sell as exempt only preparations readily capable of use for claimed medicinal purposes and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended."

Refused, over objection [60]

INSTRUCTION NO. 8

I instruct you that Article 183 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

“Art. 183. Dispositions to dealers.—Orders for exempt preparations except where sold to a registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer unless it bears the registry number of the dealer giving the order (See Articles 100, 105 and 111, relative to orders received from the Virgin Islands, Puerto Rico and the Philippine Islands, respectively.)

“Where orders for exempt preparations are taken by a traveling salesman the salesman shall ascertain the registry number of the purchaser. The order shall not be filled by the manufacturer or vendor unless he knows the purchaser's registry number.”

Refused, over objection [61]

INSTRUCTION No. 10

I instruct you that Article 185 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

“Art. 185, Records required.—Every manufacturer, producer, compounder, or vendor (in-

cluding dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

“Forms are not furnished for the keeping of these records, but the records shall be in the following form:

Form of record of dispositions to registrants

Date—

Registration No. of recipient—

Name of recipient—

Add.—

Name of Prep.—

Qty.—

Form of record of dispositions to consumers

Date—

Name of recipient—

“Add.—

Name of prep.—

Qty.—

“In the case of manufacturers of or dealers in exempt preparations who are also registered as manufacturers of or dealers in taxable drugs in Class I or II, the foregoing requirements as to records of dispositions to registrants shall be deemed to be complied with, if all such dispositions are evidenced by vouchers or invoices containing all the required information and such vouchers or invoices are kept in a separate file arranged chronologically.”

Refused [62]

INSTRUCTION No. 11

I instruct you that under the Harrison Anti-narcotic Act, the dispensing of narcotics as medicine by a physician is not limited to immediate need and the physician can give, prescribe, or dispense to a patient a sufficient quantity for self administration in the light of the particular need of the particular occasion depending upon all the symptoms, conditions and circumstances of the case.

U. S. v. Anthony 15 Fed. Supp. 553.

Linder v. U. S., 268 U. S. 5-18.

Boyd v. U. S., 271 U. S. 104.

Refused. [63]

INSTRUCTION No. 12

I instruct you that the Harrison Antinarcotics Act must be interpreted as a revenue act only, and not as an act regulating the disposition and sale of narcotics or regulating medicine.

U. S. v. Anthony, 15 Fed. Supp. 553.

Linder v. U. S., 268 U. S. 5.

Refused. [64]

INSTRUCTION No. 13

I instruct you that under the Act, the physician may dispense, give away, or deliver to a patient or an addict, in good faith, for self administration medicines, drugs or preparations exempted under Section 6, for the relief of conditions, incident to addiction or for the treatment of disease suffered by the patient.

U. S. v. Anthony, 115 Fed. Supp. 553.

Linder v. U. S., 268 U. S., 5.

Refused [65]

INSTRUCTION No. 14

I instruct you that if you find, from all the evidence, that the defendant, dispensed the drugs and preparations as alleged in all the counts of the indictment as medicines, and not for the purpose

of evading the intentions and provision of this Act, you will find the defendant not guilty.

✓ Refused [66]

INSTRUCTION No. 15

I instruct you that if you find, from all the evidence, that the defendant dispensed to patients the drugs and preparations as alleged in all the counts of the indictment, as medicines and in the practice of his profession only, and not for the purpose of evading the intentions and provisions of the Act, and that he failed to keep a record of such dispensations as provided by law, then you may consider, upon all the evidence the exception as provided in Sect. 2 A, which provides as follows:

“Sect. 2 (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: **PROVIDED,** That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs, dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years

from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act."

And if you find, after considering all the evidence, that the defendant was personally attending patients when he made such dispensation of the medicines and preparations as alleged in all the counts of the indictment, and failed to keep a record of such dispensations, as alleged in all counts of the indictment, because of such personal attendance, while in the practice of his profession and in good faith, you will find the defendant not guilty.

Refused [67]

INSTRUCTION No. 16

I instruct you, if you find from all the evidence, that the defendant dispensed to patients, the drugs and preparations as alleged in all the counts of the indictment as medicines and in the course of his profession only, and not for the purpose of evading the intentions and provisions of the Act, and you further find that he failed to keep a record of such dispensations as alleged in all the counts of the Indictment, because of the fact, that the defendant honestly and in good faith considered such preparations as Stock preparations as regulated and provided in Article 179 of Regulations No. 5, which provides as follows: "Stock preparations,— A practitioner who, in his office practice, adminis-

ters minute quantities of narcotics in Stock preparations, may keep, as such preparations in lieu of the record required by Act 177, a record of the date when each stock preparation is made or purchased, and the date when the preparation is exhausted," and you further find from all the evidence, that the defendant complied with such regulation, as provided in Article 179, then you will find the defendant not guilty.

Refused [68]

INSTRUCTION No. 17

I instruct you that drugs or preparations, as alleged in all the counts, which are dispensed or distributed to a patient by a physician, in the course of his professional practice only, upon whom such physician shall personally attend is a question of fact for your consideration, and in this connection I instruct you that you must consider all the evidence of this case, in the light of the particular need of the particular occasion, and all the surrounding and attending conditions and circumstances, and if after considering all the evidence, if any, you find that the defendant was personally attending patients when he dispensed or distributed said medicines and preparations as alleged in all the counts of the indictment, and in the course of his professional practice only, and because of said personal attendance upon patients while in the

course of his professional practice only, the defendant failed to keep a record of all such drugs dispensed or distributed and the defendant by such omission to keep records did not intend to evade the intentions and provisions of this Act, but honestly and in good faith failed to keep such records as provided by law, because of such personal attendance, then you will find the defendant not guilty.

Refused [69]

INSTRUCTION No. 23

The court instructs the jury that in a criminal case, the burden of proof never shifts to the defendant, and in this case the burden of proof remains upon the United States throughout the case to prove the guilt of the defendant, and the burden does not, under any circumstances, shift to the defendant to prove his innocence.

Branson—Sec. 379—pgs. 399-400.

Refused. [70]

INSTRUCTION No. 25

Each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged before he can under his oath consent to a verdict of conviction. If any of the jurors after having duly

considered all the evidence and after having consulted with his fellow jurymen, entertain such reasonable doubt, it will be the duty of such juror not to consent to a verdict of guilty.

Terr. v. Buick, 27 Haw. 28

Refused [71]

INSTRUCTION No. 10 PROS.

A reasonable doubt is the condition of mind produced by the proof resulting from the evidence in the case. It is an honest, substantial misgiving, founded upon reason, generated by the proof or lack of proof and resulting solely upon evidence in and not outside of the case, so the reasonable doubt to which every defendant is entitled must likewise be founded upon evidence in the case or upon a lack of evidence. It is such a state of the proof as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused. If the whole evidence when carefully examined, weighed, compared and considered, produces in your minds a settled conviction or belief of the defendant's guilt—such an abiding conviction as you would be willing to act upon the *the* most weighty and important affairs of your life—you may be said to be free from any reasonable doubt and should find a verdict in accordance with that conviction or belief. But if you still retain in your mind a reasonable doubt of the guilt of the defendant, it is your duty to vote for an acquittal.

Refused as covered [72]

INSTRUCTION No. 1

Gentlemen of the jury, the testimony and evidence in this case is now before you. The lawyers have made their arguments and have analyzed the testimony and given you their viewpoint from which the issue must be approached and the conclusions which should inevitably follow. The lawyers and the jury and the Judge have each their particular duties to perform in the trial of a criminal case. The lawyers for each side are required to present the testimony bearing upon the guilt or innocence of the party on trial. The duty of the Judge is, essentially, to see that the trial is orderly conducted, that hearsay and immaterial matters are excluded, and to advise the jury upon the law which is applicable to the case. The function of the jury is separate and distinct from that of the lawyers and the Judge. It is the duty of the jury to find what are the facts from the evidence which has been presented, and in doing this they must also consider the credibility of the witnesses who have testified. The lawyers have performed their part of the trial. I will now instruct you upon the law which is applicable, and your duty as jurors to find the facts is now present.

You are admonished to banish from your minds any prejudice which may be lurking there or any adverse sentiment with relation to the issue, and determine the case solely upon the issue which is presented and the law having relation to the facts having relation to the innocence or guilt of the

defendant. In the administering of the law we must not permit, sympathy, or passion, or prejudice to affect our judgment, but must determine within that narrow channel of right and justice, keeping in mind the charge, [73] the evidence, and the law, and determine what the fact is, and if the proof convinces you beyond a reasonable doubt that the defendant is guilty of one or all of the counts in the indictment, then your verdict must be "Guilty" upon such count upon which you are convinced beyond a reasonable doubt. If you have a reasonable doubt upon any one or all of the counts, it is imperative that you enter your verdict of, "Not guilty" as to that count or counts.

Given [74]

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find as follows:

Peter Young alias Young Lup,

Of Count Three Guilty

Of Count Four Guilty

Of Count Five Guilty

Of Count Six Guilty

Of Count Seven Guilty

Of Count Eight Guilty

Of Count Nine Guilty

Of Count Ten Guilty

of the Indictment heretofore filed herein.

Dated: Honolulu, T. H., this 14th day of September, 1939.

(Signed) ROBERT E. WHITE

Foreman.

[Endorsed]: Filed Sep. 14, 1939. [76]

In the United States District Court for the
Territory of Hawaii

April 1939 Term

Hawaii District Division

UNITED STATES

v.

PETER YOUNG alias YOUNG LUP

No. 9224 Criminal Indictment in 10 counts for
violation of U. S. C., Title 26, Secs. 1041 & 1047.

JUDGMENT AND COMMITMENT

On this 21st day of September, 1939, came the
United States Attorney, and the defendant Peter
Young alias Young Lup appearing in proper per-
son, and with counsel, J. V. Esposito, and,

The defendant having been convicted by a verdict
of guilty of the offense charged in the Indictment
in the above-entitled cause, to wit: failure to keep
narcotic records; (Verdict of guilty as to Counts
III to X inclusive, a nolle prosequi having been
entered as to Counts I and II of said Indictment),

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby sentenced as follows: As to Count III of said Indictment the defendant is hereby fined the sum of Two Thousand Dollars (\$2,000.00) and he is also sentenced to serve two (2) years in Oahu Prison at Honolulu, T. H., or such other place of confinement as the Attorney General or his authorized representative may designate; the execution of the prison sentence as to said Count III is suspended and the imposition of sentence as to Counts IV to X inclusive is suspended and the defendant is hereby placed on probation for a period of five years, under Rule 131 of this Court, all of said probation being further conditioned upon the payment of the fine imposed as to said Count III.

It Is Further Ordered that the Narcotic officers who are authorized probation officers of this Court shall be the defendant's probation officers.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) D. E. METZGER

Judge.

A True Copy. Certified this day of

(Signed).....

Clerk.

(By).....

Deputy Clerk. [77]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Peter Young alias Young Lup, defendant above named, and moves the court for an order vacating and setting aside the verdict and judgment, in the above entitled action, and awarding a new trial for the following reasons:

1. That said verdict and judgment are not sustained by substantial evidence.

2. That said verdict and judgment are contrary to law.

3. Errors of law occurring on the trial and excepted to by the defendant.

4. That the court erred in refusing to instruct the jury to return a verdict for the defendant of not guilty on each and every count as alleged and charged in the Indictment, at the end of the government's case upon an oral motion of defendant's counsel, upon the ground that each and every Count of the Indictment was insufficient in law and factually defective; in that, each and every Count of the Indictment failed to allege and the government failed to prove that the defendant is [79] guilty of

any crime or offense against the United States of America.

5. That the court erred in refusing to instruct the jury peremptorily, to return a verdict for the defendant, of not guilty as charged, on each and every Count as alleged and charged in the Indictment, at the close of all the evidence, upon an oral motion of counsel for the defendant upon the Grounds that each and every Count of the Indictment was insufficient in law and fatally defective; in that, each and every Count of the Indictment failed to allege, and the government failed to prove, that the defendant is guilty of any crime or offense against the United States of America.

6. That the court erred in certain particulars of its general charge to the jury, specifically excepted to by the defendant at the time, to wit:—"the defendant takes exception to the court giving over objection of the defendant, the Government Requested Instructions No. 3A, No. 4, No. 5, No. 6, and No. 7 to the jury, in its instruction and charge; the defendant also takes exception to the court's decision, in refusing to give to the jury, in its charge and instruction, the Defendant's Requested Instructions No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 10, No. 11, No. 12, No. 13, No. 14, No. 15, No. 16, No. 17, No. 23, and No. 25."

7. Irregularities in the proceedings of the court, resulting in prejudice to the defendant, and by which the defendant was prevented from having a fair trial.

That said motion is further based upon all the files and records in said cause and the bill of exceptions hereafter to be duly settled, allowed and filed.

Dated at Honolulu, T. H., this 19th day of September, 1939.

(Signed) J. V. ESPOSITO

Attorney for Peter Young
alias Young Lup

[Endorsed]: Filed Sep. 19, 1939. [80].

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant:

Peter Young alias Young Lup, 2157 Kanealii St., Honolulu, City and County of Honolulu, Territory of Hawaii.

Names and addresses of appellant's attorneys:

Joseph V. Esposito, 306 McCandless Building, Honolulu, City and County of Honolulu, Territory of Hawaii.

Hiram L. Fong, 77 Merchant St., Honolulu, City and County of Honolulu, Territory of Hawaii.

Offense:

Violations of Sections 1041 & 1047, Title 26, United States Code.

Date of Judgment: September 21, 1939.

On the 21st day of September, 1939, after the Court denied the Motion for New Trial filed by the

defendant, after the defendant duly excepted for the reasons stated in the Argument of Counsel to the Court's denial and overruling of the defendant's Motion for a New Trial, the Court adjudged the defendant guilty, and in passing Judgment and sentence upon the defendant, imposed a [82] fine of Two Thousand Dollars (\$2000.00) upon Count III of the Indictment and a sentence of two years imprisonment; that the execution of the sentence of said two years imprisonment was stayed and suspended, and the defendant was put on probation for a period of five years; that upon Counts IV to X inclusive of the said Indictment, the Court suspended the sentence for a term of five years with costs remitted; that the Court stayed the issuance of the mittimus and mittimus of the aforesaid judgment, sentence and fine for a period of forty-eight (48) hours pending the filing of a joint appearance and supersedeas bond in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for Ninth Judicial Circuit from the judgment, sentence and fine above mentioned on the grounds set forth below.

PETER YOUNG, alias
YOUNG LUP

Defendant-Appellant.

Dated at Honolulu, T. H., this 21st day of September, 1939.

Grounds of appeal:

1. That said verdict and judgment are not sustained by substantial evidence.

2. That said verdict and judgment are contrary to law.

3. Errors of law occurring on the trial and excepted to by the defendant.

4. That the court erred in refusing to instruct the jury to return a verdict for the defendant of not guilty on each and every count as alleged and charged in the Indictment, at the end of the government's case upon an oral motion of defendant's counsel, upon the ground that each and every Count [83] of the Indictment was insufficient in law and fatally defective; in that, each and every Count of the Indictment failed to allege and the government failed to prove that the defendant is guilty of any crime or offense against the United States of America.

5. That the court erred in refusing to instruct the jury peremptorily, to return a verdict for the defendant, of not guilty as charged, on each and every Count as alleged and charged in the Indictment, at the close of all the evidence, upon an oral motion of counsel for the defendant upon the Grounds that each and every Count of the Indictment was insufficient in law and fatally defective; in that, each and every Count of the Indictment failed to allege and the government failed to prove, that the defendant is guilty of any crime or offense against the United States of America.

6. That the court erred in certain particulars of its general charge to the jury, specifically excepted to by the defendant at the time, to wit:—"the defendant takes exception to the court giving over objection of the defendant, the Government Requested Instructions No. 3A, No. 4, No. 5, No. 6, and No. 7 to the jury, in its instruction and charge; the defendant also takes exception to the court's decision, in refusing to give to the jury, in its charge and instruction, the Defendant's Requested Instructions No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 10, No. 11, No. 12, No. 13, No. 14, No. 15, No. 16, No. 17, No. 23, and No. 25."

7. Irregularities in the proceedings of the court, resulting in prejudice to the defendant, and by which the defendant was prevented from having a fair trial.

Dated at Honolulu, T. H., this 21st day of September, 1939.

PETER YOUNG, alias
YOUNG LUP

Defendant-Appellant. [84]

Receipt of a copy of the within Notice of Appeal is hereby acknowledged this 22nd day of Sept. 1939

(Signed) WILLSON C. MOORE

Ass't. U. S. Attorney

[Endorsed]: Filed Sep. 22, 1939. [81]

[Title of District Court and Cause.]

COST BOND

Know All Men by These Presents:

That, we, Peter Young alias Young Lup, as Principal and Y. H. Leong and James Tsark, as sureties, all of Honolulu, City and County of Honolulu, Territory of Hawaii, are held and firmly bound unto the plaintiff, The United States of America, in the above entitled cause in the sum of Five Hundred (\$500.00) Dollars, to be paid to the said plaintiff, The United States of America, for the payment of which well and truly we bind ourselves and our respective heirs, executors and administrators, jointly and severally by these presents.

The condition of this obligation is such that:

Whereas, the above named Peter Young alias Young Lup, defendant above named, has taken an appeal from the District Court of the United States in and for the District of Hawaii, to the United States Circuit Court of Appeals for the Ninth [86] Judicial Circuit, to review the verdict entered herein on the 14th day of September, 1939, and the judgment, sentence and fine made and entered herein on the 21st day of September, 1939:

Now, Therefore, if the above named Peter Young alias Young Lup shall prosecute his appeal with effect and shall answer all costs if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals at Honolulu, T. H., this the 21st day of September, 1939.

[Seal]

PETER YOUNG, alias
YOUNG LUP

Principal.

[Seal]

Y. H. LEONG

[Seal]

JAMES TSARK

Sureties.

Territory of Hawaii

City and County of Honolulu—ss.

Y. H. Leong and James Tsark being each first duly sworn, on oath depose and say: That they are resident freeholders of Honolulu, City and County of Honolulu, Territory of Hawaii, and have assets and real property situated within the Territory of Hawaii and within said City and County subject to execution and that they are worth in real and personal property within the Territory of Hawaii more than double the amount of the penalty specified in said bond, over and above all their debts, liabilities and property exempt from execution.

Y. H. LEONG

JAMES TSARK

Subscribed and sworn to before me this 21st day of September, 1939.

[Seal]

RUTH UYEMURA

Notary Public, First Judicial Circuit, Territory of Hawaii.

Approved as to Form

(Signed) WILLSON C. MOORE

Ass't. U. S. Attorney.

[Endorsed]: Filed Sept. 22, 1939. [87]

[Title of District Court and Cause.]

BOND

Know All Men by These Presents:

That, we, ~~Peter Young~~ alias Young Lup, as Principal and Y. H. Leong, and James Tsark, as Sureties are held and firmly bound unto the United States of America in the full sum of Two Thousand Five Hundred Dollars (\$2,500.00) for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately at the April Term A. D., 1939, of the District Court for the United States in and for the District and Territory of Hawaii, judgment, sentence and fine were made and entered against the said Peter Young alias Young Lup, defendant above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to secure a reversal of said judgment, sentence and fine, and [89]

Whereas, the Honorable Delbert E. Metzger, Judge of said District Court, did regularly order that a supersedeas and bail bond be given in the sum of Two Thousand Five Hundred Dollars (\$2,500.00) pending said appeal.

Now, Therefore, the condition of the above obligation is such that if the said Peter Young alias Young Lup shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment, sentence and fine appealed from as said Circuit Court may direct, if the judgment, sentence and fine against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a re-trial of said cause and abide by and obey all the orders made by said District Court provided the judgment, sentence and fine made against him shall be reversed by said Circuit Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof the above bounden principal and sureties have hereto affixed their hands this 21st day of September, 1939.

PETER YOUNG, alias
YOUNG LUP

Principal.

Y. H. LEONG
JAMES TSARK

Sureties. [90]

Territory of Hawaii

City and County of Honolulu—ss.

Y. H. Leong being first duly sworn on oath deposes and says: That he is the Y. H. Leong named as Surety and who signed the foregoing Bond and that he is worth the sum of Two Thousand Five Hundred Dollars (\$2,500.00) over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

Y. H. LEONG

Subscribed and sworn to before me this 21st day of September, 1939.

[Seal]

RUTH UYEMURA

Notary Public, First Judicial Circuit, Territory of Hawaii.

Territory of Hawaii

City and County of Honolulu—ss.

James Tsark being first duly sworn on oath deposes and says: That _____ is the James Tsark named as Surety and who signed the foregoing Bond and that he is worth the sum of Two Thousand Five Hundred Dollars (\$2,500.00) over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

JAMES TSARK

Subscribed and sworn to before me this 21st day of September, 1939.

[Seal]

RUTH UYEMURA

Notary Public, First Judicial Circuit, Territory of Hawaii.

Approved as to form:

(Signed) WILLSON C. MOORE

United States Attorney.

Approved as to amount and sufficiency of surety:

(Signed) D. E. METZGER

Judge, United States District
Court.

[Endorsed]: Filed Sept. 22, 1939. [91]

[Title of District Court and Cause.]

ORDER OF CONTINUANCE

Good Cause Appearing Therefor, It Is Hereby Ordered that all and singular, the causes and/or proceedings of whatsoever nature, criminal and civil, pending and undisposed of before the United States District Court, for the Territory of Hawaii, at the April 1939 Term thereof; be, and the same are, and each of them is hereby continued for hearing or other disposition at the October 1939 Term of said United States District Court, for the Territory of Hawaii.

Dated at Honolulu, T. H., this 6th day of October, 1939.

(Signed) S. C. HUBER

Judge,

United States District Court,
Territory of Hawaii.

(Signed) D. E. METZGER

Judge,

United States District Court,
Territory of Hawaii.

[Endorsed]: Filed Oct. 6, 1939. [98]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Delbert E. Metzger, Judge of the District Court aforesaid:

The above named Peter Young alias Young Lup, defendant-appellant, feeling aggrieved by the verdict of the jury entered thereon, in the above entitled action, on the 14th day of September, 1939, and the judgment, sentence and fine entered thereon, in the above entitled action, on the 21st day of September, 1939, hereby appeals from said verdict, judgment, sentence and fine to the United States Circuit Court of Appeals for the Ninth Judicial Circuit; that the errors upon which such appeal is based are contained in the Assignments of Errors filed herewith; that petitioner prays that his appeal be allowed and that a citation be issued in accordance with law; and that an authenticated transcript of the record, proceedings, and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California. [100]

And your petitioner further prays that an order be made, fixing the amount of security to be given by appellant conditioned as provided by law, and that execution of the judgment, sentence and fine be superseded until final determination of said appeal.

Dated at Honolulu, T. H., this 15th day of November, 1939.

PETER YOUNG alias
YOUNG LUP

Defendant-Appellant,

By

/s/. JOSEPH V. ESPOSITO

/s/ HIRAM L. FONG

His Attorneys.

The foregoing appeal is allowed. The joint bail and supersedeas bond in the sum of Two Thousand Five Hundred Dollars (~~\$2500.00~~) as heretofore specified, approved and filed and a cost bond on appeal in the sum of Five Hundred Dollars (\$500.00) as heretofore specified, approved and filed, are approved.

Dated at Honolulu, T. H., this 15 day of November, 1939.

By the Court:

(Signed) D. E. METZGER

Judge

Attest:

[Seal] (Signed) WM. F. THOMPSON JR.

Clerk [101]

Receipt of a copy of the within is hereby acknowledged this.....day of November, 1939.

(Signed) WILLSON C. MOORE

Ass't. U. S. Attorney

[Endorsed]: Filed Nov. 15, 1939. [99]

[Title of District Court and Cause.]

CITATION ON APPEAL

The United States of America—ss.

The President of The United States of America
and Ingram M. Stainback, Its Attorney:

Greeting:

You Are Hereby Cited and Admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Judicial Circuit in the City of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an appeal duly allowed and filed in the office of the Clerk of the United States District Court for the District and Territory of Hawaii, on November 15th, 1939, in said cause, wherein Peter Young alias Young Lup is appellant and you are the appellee, to show cause, if any there may be, why the verdict, judgment, sentence, and fine in said appeal mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 15th day of November, 1939.

D. E. METZGER

Judge,

United States District Court
of the District and Territory
of Hawaii.

Attest:

[Seal]

WM. F. THOMPSON JR.

Clerk. [103]

Receipt of a copy of the within is hereby acknowledged this 15th day of November, 1939.

WILSON C. MOORE

Ass't. U. S. Attorney. [102]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

Sir:

Please prepare a Transcript of the Record on the Petition for Appeal, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, in the above entitled cause, and incorporate in said Transcript of the Record, the following:

1. Indictment.
2. Arraignment.
3. Plea of Not Guilty.
4. Defendant's Motion for a Directed Verdict of Not Guilty made orally at close of the Government's case.
5. Court's oral denial and overruling of said defendant's Motion for a Directed Verdict, made at close of the Government's Case.
6. Defendant's oral exception to the Court's denial and overruling of said defendant's Motion for a Directed Verdict at close of the Government's case. [145]
7. Defendant's Motion for a Directed Verdict of Not Guilty made orally at the close of all the evi-

dence after all the parties had rested.

8. Court's oral denial and overruling of the defendant's oral Motion for a Directed Verdict of Not Guilty, made at close of all the evidence.

9. Defendant's oral exception, in the presence of the jury, before the jury retired, to the Court's denial and overruling of the defendant's Motion for a Directed Verdict as aforesaid.

10. All the Exhibits introduced by all the parties to the above entitled cause, to wit: the United States Exhibits 1, 2, 3, inclusive and the Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, and K, inclusive.

11. All the Government's Requested Instructions.

12. All the Defendant's Requested Instructions.

13. Instructions and Charge given by Court.

14. Verdict of Jury.

15. Defendant's Exception to the Verdict of Jury.

16. Defendant's Motion for New Trial.

17. Court's ruling and denial of said Motion for New Trial.

18. Defendant's exception to the Court's Ruling and Denial of said Motion for a New Trial.

19. The judgment, sentence and fine of the court.

20. Defendant's exception to the Judgment, Sentence and Fine of the Court.

21. All the Minutes, Entries made by the Clerk,

or anyone else that took place in all the proceedings of the above entitled cause. [146]

22. The Transcript of all the Evidence and Testimony of the above entitled cause.

23. The defendant's written Notice of Appeal.

24. Appearance and Supersedeas Bond.

25. Costs Bond.

26. Order of the Court, in re Assignments of Reasons, Objections and Exceptions of the defendant, filed on the 29th day of September, 1939, and signed on the 30th day of September, 1939, by Honorable Delbert E. Metzger, Judge presiding.

27. Order of Court extending and continuing Judgment Term, dated the 6th day of October, 1939.

28. Petition for Appeal and its Order Allowing Appeal.

29. Citation of Appeal with Admission of Service.

30. Assignments of Error.

31. Copy of this Praecipe.

32. Bill of Exceptions.

33. Court's Order allowing Bill of Exceptions.

34. All other Minutes, Entries, Files, Pleadings, Motions, Objections and Exceptions of the defendant; Orders, Rulings, Continuances, and Extensions of Time allowed by the Court; and all other papers, documents and records necessary for prosecution of the Appeal in the above entitled cause, not specifically mentioned in the above Praecipe.

Dated: Honolulu, T. H., this 15th day of November, 1939.

**PETER YOUNG alias
YOUNG LUP,**

Defendant-Appellant,

By

/s/ **JOSEPH V. ESPOSITO**

/s/ **HIRAM L. FONG**

His Attorneys. [147]

Receipt of a copy of the within is hereby acknowledged this 15th day of November, 1939.

(S) **WILLSON C. MOORE**

Ass't U. S. Attorney

[Endorsed]: Filed Nov. 15, 1939. [144]

[Title of District Court and Cause.]

NOTICE OF FILING BILL OF EXCEPTIONS

To the United States, Above Named, and Its
Attorney, Ingram M. Stainback:

You will please take notice that the defendant-appellant, Peter Young alias Young Lup, in the above entitled action, filed in the office of the clerk of said court, on the 15th day of November, 1939, his proposed bill of exceptions in said cause; that a copy of said bill of exceptions, with a copy of said notice, is herewith served upon you.

Dated at Honolulu, T. H., this 15th day of November, 1939.

**PETER YOUNG alias
YOUNG LUP,**

Defendant-Appellant,

By

/s/ JOSEPH V. ESPOSITO

/s/ HIRAM L. FONG

His Attorneys. [149]

Receipt of a copy of the within is hereby acknowledged this 15 day of November, 1939.

(Signed) WILLSON C. MOORE

Ass't. U. S. Attorney

[Endorsed]: Filed Nov. 15, 1939. [148]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that the above entitled cause, Criminal Case No. 9224, came on regularly for trial before the Honorable Delbert E. Metzger, Judge presiding in the United States District Court for the Territory of Hawaii, on the 12th day of September, 1939, on the indictment, and the defendant's plea of not guilty when a jury was empanelled and sworn, and the United States being represented by Willson C. Moore, assistant United States attorney, and the defendant, Peter Young alias Young Lup, being present in court, and repre-

sented by his counsel, Joseph V. Esposito, and thereupon the following proceedings were had and testimony taken:

CASE FOR THE UNITED STATES

After the Clerk called the roll, and the jury panel was duly qualified, Mr. Moore asked the Court's permission to enter a nolle prosequi as to Counts One and Two of the Indictment for the reason that said Counts One and Two alleged that the drugs aforesaid were exempt narcotics when in fact they were taxable [151] narcotics, covering the tincture of opium and Analgesie No. 1, to which motion—

The Court: The motion is granted. (Tr. Page 1-2.) Mr. Moore, the United States Attorney, thereupon read the Indictment to the jury, and in a short statement to the jury mentioned that all the drugs alleged in all the Counts were exempt preparations that had been distributed and dispensed by the defendant in the course of his professional practice as a Medical Doctor during the two year period mentioned in the Indictment, without keeping proper records concerning said dispensation of drugs as provided by the law with reference to these exempt preparations; "and upon showing you that we'll ask for a verdict of guilty at your hands." (Tr. Page 4.)

The Indictment after the Court entered a nolle prosequi on the first two counts, consists of eight remaining counts, to wit: Count 3 to 10 inclusive.

Count I alleges in substance that Peter Young alias Young Lup, the defendant in the above entitled case, is a physician, who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than two grains of opium in one fluid ounce, in the course of his professional practice, from August 26, 1937 to July 21, 1939 at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, etc., seventy-two (72) gallons and four (4) pints of a preparation and remedy which is exempted by Section 6 of the Act of Congress of December 17, 1914, to wit: **PAREGORIC** and that the defendant wilfully and [152] knowingly failed to keep a record of such sales, gifts, etc., of said amount of Paregoric during said period, and that such record was not accessible to inspection by proper officers authorized for that purpose, contrary to the form of the statute, to wit, a violation of Sections 1041 and 1047, Title 26, of the United States Code, also known as Section 6 and Section 9 of the Harrison Anti-Narcotic Act.

The remaining Counts in substance make the same charges and allegations as to the time, place and violation of law, excepting that they charge different amounts and different kinds of drugs, in the different Counts, dispensed and distributed by

the defendant in his practice of medicine, but they all allege that the said different drugs and preparations are all exempt preparations according to Section 6 of the said Act.

Later it was stipulated with regards to all Counts of the Indictment, by and between the parties to this Action, by and through their respective counsel, with the approval of the Court,—that if a proper person were brought to testify in this Court, for the United States, he would produce records, and further testify that there had been sold to the defendant, and that the defendant had purchased from various drug concerns and pharmacists for the two-year period of August 26, 1937 to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, all the various drugs and preparations upon the time, place, and amounts as alleged and charged in all the Counts of the Indictment. (Tr. Pages 3-10.)

It was further stipulated by the respective parties [153] with the approval of the Court that all the preparations alleged in all the Counts 3-10 inclusive of the Indictment in the above entitled cause are exempt preparations used as medical drugs and medical preparations. (Tr. Pages 10-11.)

After the aforesaid stipulations, the only witness for the United States, (Tr. Page 12.)

FRED C. BARTHELMESS,

was sworn, testified as follows:

Direct Examination:

That he was a Federal Narcotic Agent in this District for the Territory of Hawaii, since March 3, 1934; that part of his duties was to check doctors, pharmacists and all registrants; that the defendant in this case, Dr. Young, is a registrant under the narcotic laws, holding license No. 1109, and that he knew the defendant as a member of the medical profession. That, as such Federal Narcotic Agent, the witness, in the year 1939, had occasion to check and investigate Dr. Young in regard to dispensing narcotic preparations, such as are commonly known as exempt preparations. That the witness had heard of the above mentioned stipulations of counsel for both parties to this action, and that his investigation concerned the dates and amounts of drugs as alleged in the Indictment.

The said witness testified that in regards to Count III in reference with the exempt preparation known as "Paregoric"; that the defendant, Dr. Young, had on hand at his office on July 20, 1939, two gallons and three pints; that the defendant had purchased between the period of August 26, 1937 and July 21, 1939 more than seventy-two (72) gallons and four (4) pints of Paregoric from different drug concerns and pharmacists, and that concerning said Paregoric, the defendant had kept no [154] records as required by the United States

(Testimony of Fred C. Barthelmess.)

Treasury Department Internal Revenue Commissioner accessible for his inspection. (Tr. Pages 16-17.)

In reference to the remaining Count 4 and 10 inclusive, this same witness gave testimony substantially corroborating the stipulations of counsel, concerning the dates, amounts, and drugs, as alleged in the respective Counts of the Indictment. Further, he testified that the defendant failed to keep records as required by Treasury Regulation Article No. 185 found on page 79 of Regulations No. 5 of the U. S. Treasury Department, Bureau of Narcotics, relating to Importation, Manufacturing, etc., of Opium and Coca Leaves and its Compounds and Derivatives, etc., thereupon the United States Attorney offered the said Article 185 of the said Regulations No. 5 of the U. S. Treasury Department, Bureau of Narcotics which was received by the Court as United States Exhibit I:

“Art. 185. Records required.—Every manufacturer, producer, compounder, or vendor, (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and

(Testimony of Fred C. Barthelmess.)

quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

"Forms are not furnished for the keeping of these records, but the records shall be in the following form:

Form of record of dispositions to registrants

Date—

Registration No. of recipient—

Name of recipient—

Add.—

Name of Prep.—

Qty.— [155]

Form of record of dispositions to consumers

Date—

Name of recipient—

Add.—

Name of Prep.—

Qty.—

"In the case of manufacturers of or dealers in exempt preparations who are also registered as manufacturers of or dealers in taxable drugs in Class I or II, the foregoing requirement as to records of dispositions to registrants shall be deemed to be complied with, if all such dispositions are evidenced by vouchers or in-

(Testimony of Fred C. Barthelmess.)

voices containing all the required information and such vouchers or invoices are kept in a separate file arranged chronologically."

(Tr. Page 23.)

Cross Examination

of said witness disclosed that Dr. Young, the defendant is a licensed physician and surgeon practicing in the Territory of Hawaii, and duly registered as alleged in the Indictment, and that he had paid his special tax stamp and is permitted to dispense narcotics according to the Narcotic Laws. That the witness, Barthelmess, had spoken to the defendant, Dr. Young, concerning the drugs alleged in the Indictment as part of his investigation, and was told by the defendant that he, the defendant, prescribed and dispensed said drugs to his patients (Tr. Page 26); that he was giving said drugs to his patients for coughs and stomach pains. (Tr. Page 30.)

That he did not ask the defendant if he had any vouchers for the purchase of these drugs mentioned in the eight counts of the Indictment (Tr. Pages 31-45-46); that the witness was acquainted with Article 179 in Regulations No. 5 of U. S. Treasury Department, Bureau of Narcotics, which he read to the jury in reply to a question as follows:

(Testimony of Fred C. Barthelmess.)

Regulation No. 5 U. S. Treasury Department,
Bureau of Narcotics, Article 179

"A practitioner who, in his office practice, administers minute quantities of narcotics in stock [156] preparations, may keep, as to such preparations, in lieu of the record required by Art. 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted."

(Tr. Page 32.)

The witness further testified that in regards to Paregoric, as alleged in Count 3 of the Indictment, the defendant had two gallons and three pints on hand at his office, and that the defendant said he dispensed said drug to his patients; further that Mr. Barthelmess called said drug, "stock on hand; I've listed it as such in my inventory." (Tr. Page 34.)

That the defendant told said witness that he did not keep a dispensing record of any of his exempt preparations because he did not think it was necessary to keep them, and that the defendant was familiar with the regulations and was abiding thereby. (Tr. Page 38.)

The said witness testified that he did not ask the defendant in his investigation of the defendant, whether or not the defendant kept a record of the "stock drugs" dispensed by him. (Tr. Pages 48-49.)

(Testimony of Fred C. Barthelness.)

Redirect Examination.

Barthelness.

The United States offered a letter on the stationery of Dr. Young, the defendant, addressed to C. T. Stevenson, P. O. Box 3285, Honolulu, Territory of Hawaii:

"July 24, 1939

"Mr. C. T. Stevenson.

P. O. Box 3285

Honolulu, T. H.

Dear Sir:

As requested by phone—

(1) Why do I use so much Paregoric?

I use Paregoric to mix Cough Syrups, corrective; Parepetol and English Stomach Power, especially [157] Compounded for me by Lam's Pharmacy—

(2) . Why do I use Paregoric?

I get better results by fortifying the above preparations with Paregoric.

(3) Why no label on that bottle?

Because that patient told me that it was unnecessary as he understood the directions I gave him in Chinese and that he couldn't read English anyway.

Yours truly,

P. YOUNG,"

and admitted as evidence as United States Exhibit No. 2 at (Tr. Pages 49-50.)

(Testimony of Fred C. Barthelmess.)

Recross Examination.

Barthelmess.

Witness testified that he considered as stock preparation certain special English prescriptions of drugs which Lam's Pharmacy would on occasion compound for the defendant, mentioned in the United States Exhibit No. 2.

The Section 6 of the Harrison Anti-Narcotic Act, also known as Section 1047 U. S. C. provides as follows:

"Sec. 6. That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts

or any synthetic substitute for them: **PROVIDED**, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: **PROVIDED FURTHER**, That any manufacturer, producer, compounder, or [158] vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such oc-

cupation as provided in this Act. The provisions of this Act as amended, shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine."

That Section 2 and Section 2A of the same Act is as follows:

"Sec. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 5 of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal

Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be [159] readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: PROVIDED, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act."

At the close of the case for the United States, the defendant moved for a directed verdict and that the defendant be discharged upon any and all Counts as alleged and charged in the Indictment—

"Mr. Esposito: Your Honor, at this time we

move that this defendant be discharged and dismissed of every and all counts alleged and charged in this indictment, for the following reasons; That each and every count and all the counts do not state sufficient allegations to charge any offense or crime against the United States Government or the Territory of Hawaii, or both:—

Mr. Moore: Well, we can't charge it against the Territory of Hawaii, because we're in the Federal Court.

Mr. Esposito: Any crime of any kind whatsoever. (2) That the evidence introduced by the United States Government upon these eight counts alleged in this indictment after striking out Count One and Count Two of the indictment, [160] that that evidence is insufficient to prove or corroborate any of the requirements charging a crime or a felony of the Harrison Anti-Narcotic Act or of the Act known as of 1914; that the indictment merely states and by its allegations infers that it is a crime for the Doctor, who is registered and licensed to be a physician and surgeon in the Territory of Hawaii, has paid his narcotics tax stamp or stamp tax according to law, has fulfilled all the requirements, that while he is in the practice of his profession of medicine he has distributed the alleged exempt drugs and medicines to patients in the lawful practice of his profession of medicine, that there is no evidence that he has not in any one case personally attended to these patients; that the

entire eight counts make it a crime, a felony, if Your Honor please, for a lawfully registered doctor and surgeon to fail to keep a record of exempt drugs; that those eight counts of the indictment do not charge a felony or a crime according to the Harrison Anti-Narcotic Act; that it is a conclusion of the prosecutor that that is a crime, and that any interpretation, inference or construction that the prosecutor or his assistants and associates give to the Harrison Narcotic Act deducing and concluding from that deduction or interpretation that the allegations charged in the eight counts constitute a felony of the Harrison Narcotic Act is unconstitutional, to-wit, for the following reasons: That their interpretation and construction of this Harrison Narcotic Act as they allege and claim in these eight counts of the indictment give an authority not delegated to the Commissioner of Internal Revenue to make [161] rules and regulations, called "articles", interpreting this Act against the United States laws, on the Constitution and its amendments; that Congress cannot delegate a power to the Internal Revenue Commissioner or the Commissioner of Narcotics or to the Secretary of the Treasury or to any of his agents and officers to regulate the practice of medicine and pharmacy requiring the interpretation and inference of these eight counts as claimed by the prosecutor; that that is a police power of the State and the Territory to regulate the practice of medicine, whether or not a

doctor should keep records; that it is further unconstitutional that reference to the alleged Act itself, your Honor, the Harrison Narcotic Act, by its inferences that expressly asservate making it a crime for a doctor that has a license and has paid his tax, that honestly practices his profession, without recording the exempt drugs, that any interpretation or inference in interpreting the Act that makes such a crime is a power that the United States Congress has not, because it regulates the practice of medicine, infringes and violates upon the police powers of the State and is therefore unconstitutional; and for the last reason, Your Honor, that any inference or interpretation of these eight counts of the indictment concluding that they are a violation of the Harrison Narcotic Act, by that interpretation, where the Act is silent or omits to make a crime the failure to record exempt drugs, that any such inference would also render the Act unconstitutional if the Court were to rule such interpretation legal. We claim, Your Honor, that the Act as we interpret it is constitutional and has been inter- [162] preted by the Federal courts, but by the interpretation given to this Act by the eight counts that that interpretation, inference or deduction is unconstitutional. And, Your Honor, in concluding the motion I further request that the jury be dismissed or excused temporarily; and whenever Your Honor decides, I have authorities that will take me from one to two hours to cite to Your Honor in support of this motion for a directed

verdict and I'd like to be heard on the law." (Tr. Pages 53-54-55.)

"The Court: The motion for a directed verdict for the discharge of the defendant is overruled.

Mr. Esposito: And, Your Honor, may I be allowed an exception to the Court's ruling in overruling and denying my motion for a directed verdict, for the reasons mentioned in my motion here and also incorporated in the argument yesterday afternoon." (Tr. Page 61.)

THE DEFENSE (Tr. Page 61.)

PETER YOUNG alias YOUNG LUP,

the defendant in the above entitled cause, took the stand in his own behalf, and after being duly sworn, testified in substance as follows: that he is a resident of the City and County of Honolulu, Territory of Hawaii, an American citizen by birth, born in said Honolulu, City and County of Honolulu, Territory of Hawaii; that he is a physician and surgeon duly licensed to practice in the Territory of Hawaii, and in practice about two years; that he is a graduate of the University of London, University of Great Britain and the Royal College of Physicians of London, and from the College of Surgeons of England, a married man, age 38 (thirty-eight) years, and [163] father of a thirteen (13) year old boy, and registered according to

(Testimony of Peter Young alias Young Lup.)

Harrison Anti-Narcotic Act and had paid the regular tax to the Internal Revenue Commissioner.

The defendant admitted in form and substance that he purchased, dispensed, distributed and gave away the various drugs and the quantities thereof alleged in all the counts of the indictment at the time, place and dates alleged in said Indictment and as stipulated by record, to his patients, as medicines in the treatment of various diseases, in the course of his professional practice only, and not with the intent to evade the provisions of the Act, to wit: the Harrison Anti-Narcotic Act; that he did not keep a written record of said dispensation and distribution, of said drugs as required by Article 185 of Regulation No. 5 of the U. S. Treasury Department, Bureau of Narcotics, because said written record was not required according to the provisions of said Act, and for the following reasons: that according to the provisions of Section 2A of said Harrison Anti-Narcotic Act, that a physician is privileged to dispense and distribute narcotics as medicines in the course of his professional practice only, to patients, in good faith, and that if said physician dispensed and distributed said drugs to his patients as aforesaid upon whom such physician shall "personally attend", then it was not necessary for such physician to keep a record of all such drugs dispensed or distributed showing the amount dispensed or distributed, the date, and the name and address of the

(Testimony of Peter Young alias Young Lup.)

patients to whom such drugs are dispensed and distributed, because said Section 2A of the Act excepted the aforesaid.

(2) That according to Article 179, printed on page 76 of Regulation No. 5 of the U. S. Treasury Department, Bureau of [164] Narcotics, United States Exhibit 1, providing as follows:

“Art. 179. Stock preparations.—A practitioner who, in his office practice, administers minute quantities of narcotics in stock preparations, may keep, as to such preparations, in lieu of the record required by Art: 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted,”

that it was not necessary for him, a registered physician and surgeon, to keep a written record, as required by Article 185 of said Regulation No. 5 of said U. S. Treasury Department, Narcotic Division, United States Exhibit 1, because of the fact that all the drugs involved and charged in the allegations of all the counts of the Indictment were “Stock preparations” kept in his office as such, and dispensed and distributed by the defendant as medicines to his patients in the course of his professional practice only, and not with the intent to evade the provisions of the Act; that said Stock preparations contained minute quantities of narcotics, and also contained active medicinal drugs other than narcotics in suffi-

(Testimony of Peter Young alias Young Lup.)

cient proportion to confer upon the preparation valuable medicinal qualities other than those possessed by the narcotic drug, and as to such stock preparations, he had kept a written record substantially in compliance of, and as provided by said Article 179 of said Regulation No. 5, and thereby the defendant introduced the Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, inclusive to corroborate and evidence his defense, which were admitted by the Court as

DEFENDANT'S EXHIBIT "A"

admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 72. It represents a Record Book kept by the defendant, in his own hand writing, comprising fifteen (15) pages which has entries, giving the [165] total monthly Gross Income of Cash received by the defendant in his practice of his profession from the period of January 1, 1939, to August 30, 1939. It also contains entries of total drugs purchased monthly for said period of time with the total amount of money spent for the monthly purchase of all drugs by the defendant, both taxable narcotics, exempt narcotics and non-narcotic drugs, as follows:

(Testimony of Peter Young alias Young Lup.)

Month	Total Drugs Purchased	Gross Income Rec'd
January, 1939	\$486.91	\$1007.10
February, 1939	390.76	982.75
March, 1939	417.98	1228.05
April, 1939	463.42	1251.20
May, 1939	435.42	1538.25
June, 1939	355.70	1540.55
July, 1939	483.31	1209.70
August, 1939	544.97	1000.30

Defendant's Exhibit "B"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 73, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of August 30, 1937, to September 5, 1939, from Hospital Purveyors, Ltd., 848 S. Beretania St., Honolulu, Territory of Hawaii.

Defendant's Exhibit "C"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 73, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of August 31, 1938, to September 7, 1939, from [166] Stewart's Pharmacy, Fort St., Honolulu, Territory of Hawaii.

Defendant's Exhibit "D"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 74, is a file containing all the vouchers, bills,

(Testimony of Peter Young alias Young Lup.)

invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of September 3, 1938, to September 7, 1939, from Theo. H. Davies & Co., Ltd., Honolulu, Territory of Hawaii.

Defendant's Exhibit "E"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 74, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of September 27, 1938, to September 1, 1939, from Honolulu Medical Supply Co., P. O. Box 2158, Honolulu, Territory of Hawaii.

Defendant's Exhibit "F"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 75, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of October 4, 1937, to August 25, 1939, from The Upjohn Co., 199 First St., San Francisco, California.

Defendant's Exhibit "G"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 75, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of August 28, 1937, to July 31, 1939, from The S. E. Massengill Co., 240 Fourth St., San Francisco, California.

(Testimony of Peter Young alias Young Lup.)

Defendant's Exhibit "H"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 75, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant [167] for the period of February 28, 1938, to September 6, 1939, from Lam's Pharmacy and Phillip's Pharmacy, 1386 Liliha St., Honolulu, Territory of Hawaii.

Defendant's Exhibit "I"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 76, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of August 27, 1937, to September 7, 1939, from McKesson & Robbins, Honolulu, Territory of Hawaii.

Defendant's Exhibit "J"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 76, is a file containing all the vouchers, bills, invoices and receipts of all drugs both narcotic and non-narcotic purchased by the defendant for the period of September 21, 1937, to September 6, 1939, from American Factors, Ltd., Honolulu, Territory of Hawaii.

Defendant's Exhibit "K"—admitted on September 13, 1939, in Criminal Case No. 9224, Transcript page 77, consists of an order book in compliance with Article 179 of U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5, having an

(Testimony of Peter Young alias Young L. p.)

inventory of all the drugs and exempt preparation purchased by the defendant for the period of August, 1937, to July, 1939, as alleged in all the counts of the Indictment with the ~~date~~ of purchase and date of exhaustion and considered as "Stock preparations", with the name of drug, of the vendor, and the amount purchased.

The defendant, at no time, testified nor did he claim to be ignorant of the law of the Harrison Anti-Narcotic Act, [168] its amendments and of the rules and Articles as made and provided by the Internal Revenue Commissioner and approved by the Secretary of the Treasury and known as Regulations No. 5—United States Exhibit No. 1 of this case, on the contrary the defendant testified that he was well aware of the law, rules, articles and regulations of the Harrison Anti-Narcotic Act, and that he had complied with terms and provisions thereof (Tr. Pages 64, 95, 96.)

After the defendant rested his case, the United States rested without any rebuttal thereupon the defendant by his counsel, at the close of all the evidence, after both parties had rested, in the presence of the jury, before the jury retired for deliberation, moved the Court, peremptorily, for a directed verdict and for the discharge of the defendant upon all the counts of the Indictment—

Mr. Esposito: And, Your Honor, because the defense introduced some evidence, I understand the Federal rule is that a motion for a directed verdict at the close of all the evidence must be repeated. Therefore, I now move the Court that the Court instruct the jury to return a verdict for the defendant on all the counts charged in the indictment, for the reason that (1) said indictment and the evidence adduced fails to prove that the defendant is guilty of any offense against the United States of America; (2) or that said indictment and all its counts is and are insufficient in law; (3) this is the reason that I didn't move yesterday, Your Honor, it slipped my memory, that Sec. 6 of the Harrison Anti-Narcotic Act does not make it a crime for failure to keep records of exempt drugs, and if it does, Your Honor, by interpretation or by construction, said Sec. 6 of the Harrison [169] Anti-Narcotic Act or that part is invalid inasmuch as it is unconstitutional in that it regulates the practice of medicine; that said Sec. 6 of said statute is indefinite and ambiguous; that said Sec. 6 is a tax measure exempting certain drugs as alleged in all the counts from taxation and the provisions of the Act if the alleged enumerated conditions of the said section are complied with; that if any of the conditions are not complied with, then said exempt drugs become taxable and the provisions of the Act apply. And lastly, Your Honor, that said Sec. 6, if it is so interpreted to mean that it charges an offense or a crime against the United States as alleged in the indictment, is

further invalid and unconstitutional because it infringes upon the police powers of a state or a territory in that it regulates or attempts to regulate the practice of medicine; and further, because of its ambiguity, indefiniteness and uncertainty it violates the "due process" clause of the Constitution, of the Fifth Amendment and other provisions of the United States Constitution. And for these reasons, Your Honor, we move that the Court peremptorily and absolutely direct this jury to return a verdict in favor of the defendant that he is not guilty of any and all of the counts alleged in this indictment.

The Court: The motion is denied.

Mr. Esposito: Your Honor, for the reasons stated may we reserve an exception to the Court's ruling. (Tr. Pages 114-115)

The jury was excused pending discussion and settlement of instructions— [170]

"At 1:30 P. M., September 13, 1939, appeared in the Judge's Chambers. (The Court, the Clerk, and opposing counsel appear for the settling of instructions. Upon appearance, the Official Court Reporter is informed by the Court that his presence is not required.)" (Tr. Page 117.)

The discussion and settlement of United States Requested Instructions No. 1-No. 11 inclusive, and the Defendant's Requested Instructions No. 1-No. 25 inclusive, began about 1:30 P. M. and lasted until 4:00 P. M. of the said day of September 13, 1939. After counsel for the defendant assigned reasons for his objections and exceptions with extended argu-

ment, to the Court's giving the Government's Requested Instructions No. 3A, 4, 5, 6, 7, to jury, over objection of the defendant, and to the Court's refusal to give to the jury, the defendant's Requested Instructions No. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 23 and 25 inclusive.

At the end of the Court's Instructions to the jury, the defendant duly excepted to the same:

"Mr. Esposito: Yes, if Your Honor please. At this time the defendant, if Your Honor please, takes exception to the Court giving over objection of the defendant the Government's requested instructions numbers 3-A, 4, 5, 6, 7, to the jury in its instructions and charge. Also, the defendant takes exception to the Court's decision in refusing to give to the jury in its charge and instructions the defendant's requested instructions numbers 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 23 and 25, for the reasons stated." (Tr. Pages 119-120.) [171]

"Mr. Esposito: Your Honor, at this time we except to the verdict of the jury on all counts because it is contrary to law and contrary to the evidence.

The Court: Exception noted. Defendant, upon the verdict rendered by the jury the Court adjudges you to be guilty on Counts 3, 4, 5, 6, 7, 8, 9, and 10.

Mr. Esposito: Your Honor, we take exception to the Court's judgment here, and give notice of motion for a new trial." (Tr. Page 121.)

"Mr. Esposito: If the Court please, I don't intend to take very much of the time of the Court, but so that I may have a brief resume of these different

methods that I have brought up in the alleged assignment of errors, we really have one issue here, one question of law, but courts have interpreted this one issue of law, some in the affirmative way, and others in the negative way, so that I collected or completed about seven reasons why this indictment is insufficient in law and fatally defective. Your Honor recalls that I have three requested direct instructions; one was a motion at the end of the Government's case; then after putting on the defense, again I made a motion for a directed verdict at the end of all the evidence adduced; then my first requested instruction in chambers for the directed verdict; naturally that brings three different methods of attacking the same deficient indictment with the weight of the evidence, as a question of law, Your Honor. So that we claim that the Court erred in overruling these three different motions for requested directed instructions, wherein we requested the Court peremptorily to instruct the jury to return a verdict [172] of "Not Guilty" and to discharge the defendant. The reasons, Your Honor, we will enumerate:

(1) That the facts set forth and alleged in the indictment and in any and every count thereof fail to state facts sufficient to show that the defendant has violated any law of the United States of America, or that the defendant is guilty of any crime or offense, or that the defendant has violated any of the requirements or provisions of the so-called Harrison Anti-Narcotic Act, also known as the Act of

Congress of December 17, 1914, and its three subsequent amendments, and that therefore every count of the indictment is fatally defective; further, that each and every count of the indictment affirmatively alleges and the evidence affirmatively shows that the defendant did not violate any law of the United States of America and did not violate Section 6 nor Section 9 of the aforesaid Act or its amendments.

(2) Assuming that if said facts as stated and alleged in each and every count of the indictment are within the requirements and provisions of said Section 6 and Section 9 of the said Act, which sections are also known as Section 1041 and Section 1047 of Title 26, United States Code Annotated, then to that extent of the assumption and to that interpretation of Section 6 and Section 9 the said Harrison Anti-Narcotic Act and its amendments are invalid and unconstitutional because it is in violation of Article 10 of the Amendments of the United States Constitution, in that said Section 6 and Section 9 are an attempt by Congress to exert powers not delegated to it, Congress, by the United [173] States Constitution and its Amendments; further, that said Section 6 and Section 9 of said Act, as interpreted by the Court, are an infringement upon and a violation of the police powers as granted to every State and the Territory of Hawaii by the United States laws, in that it is a regulation of the practice of medicine affecting and appertaining to physicians and surgeons and therefore unconstitutional.

(3) That said Section 6 of said Act, as interpreted and ruled by the Court, is inconsistent with and contrary to Section 2-A of the said same Act of Congress of December 17th, 1914, and its amendments, in that the said Section 6 of said Act fails to provide for the exception, of keeping records of narcotic drugs dispensed by a physician, dentist, veterinary surgeon, of Section 2-A, "such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend", and as is excepted by the provisions of said Section 2-A of the said Act, of the so-called Harrison Anti-Narcotic Act, and therefore the said Section 6 as interpreted by the Court is invalid and unconstitutional for the reason that said Section 2-A of said Act has already been declared valid and constitutional by the United States Supreme Court in at least five decisions.

(4) That said Section 6 and Section 9 of the said Act are a violation of the "due process" clause of the United States Constitution and its Amendments in that it is a statute or Act which forbids or requires the doing of an act in terms so vague, indefinite, uncertain, and ambiguous that men of common intelligence must necessarily guess at the meaning of the Act and differ as to the application thereof. [174] In this case, Your Honor, we say that the defendant is a man of common intelligence; in interpreting the Act he honestly assumed that the exception of Section 2-A, to-wit, that when a doctor gives medicine to a patient in the honest practice

and course of his profession, without any intent to evade the Act, that under the exception of personal attendance he didn't have to keep records. Now, if this same Harrison Anti-Narcotic Act given an exception and privilege to a doctor when he prescribed in the raw state Morphine, he assumed that Section 6, in his interpretation, also provides the same exception. If this Act gives a doctor the exception and privilege not to keep a record when used in personal attendance in distributing the raw Morphine, Opium, or Cocaine, which is greater than the exempt drugs, he assumed in his interpretation that the personal attendance exception applied to Section 6; and because of the ambiguous and non-specific provision of the statute it is uncertain and therefore a violation of the "due process" clause of the law, that this man is deprived of the privilege granted to every doctor by Section 2-A of the statute, and here, by the interpretation of the Court that there is no exception to Section 6 in regard to personal attendance, he is deprived of this right granted by Section 2-A, by the interpretation of Section 6, and because of the ambiguity, uncertainty and vagueness that would be a violation of due process.

(5) : That the said Section 6 and Section 9 of the same Act do not constitute or make an offense or crime against the United States of America the mere failure to keep a record of exempt drugs which are dispensed as medicines and not with the intent to evade the provisions [175] of the Act by a physician who was duly licensed and registered to practice

medicine and who has paid his Federal narcotic tax fee according to law, when the said exempt drugs, according to law, are dispensed and distributed by said physician in good faith to patients as medicine in the course of his professional practice only, as the evidence adduced by both parties discloses that the defendant did, and as alleged in all the counts of the indictment.

(6) That, assuming the most favorable interpretation, with all its reasonable attending inferences, to the evidence adduced by the United States Government against this defendant, yet the hypothesis of innocence of this defendant applies to all the evidence, and the defendant should be discharged as a question of law.

(7) And, last, if Your Honor please, that the intent and purpose of the legislators, that is, the members of the houses of Congress, in enacting Section 6 of the Act of Congress of December 17, 1914, and its subsequent amendments, was to exempt certain drugs which contained small amounts of opium or its derivatives, which amounts are enumerated specifically in said Section 6, from taxation, the exemption in Section 6 saying that if a doctor in good faith prescribes any drug that has less than two grains of opium to the fluid ounce, that has less than one grain of morphine to the fluid ounce, that has less than one-eighth of a grain of heroin to the fluid ounce, or less—I mention opium, morphine, heroin, I think those are the three exceptions—

(Tr. Pages 121-122-123-124-125-126.) [176]

"Mr. Esposito: —And we submit, Your Honor, that upon these alleged assignments of error that this defendant should be granted a new trial or discharged peremptorily because of the fatally defective indictment and the evidence. We submit our motion.

The Court: You made your points perfectly clear to me.

Mr. Esposito: Thank you, Your Honor.

The Court: I think you've presented your contentions well.

The Court doesn't agree with your construction of the Act and is quite satisfied that the indictment does in good form set out a violation of the law.

The motion for a new trial is denied.

Mr. Esposito: And, Your Honor, for the reasons stated, may we be permitted an exception to protect our record.

The Court: Noted." (Tr. Pages 126-127.)

"The Court: It is the judgment and sentence of the Court that on your Conviction on Count Three of the indictment, you pay a fine of \$2,000.00; and in addition you are sentenced to two years imprisonment on that Count; the sentence of imprisonment is stayed for a period of Five Years, during which time you will be on probation. As to the Counts Four to Ten, inclusive, sentence is suspended for a term of Five Years. The costs are remitted." (Tr. Page 127.)

"Mr. Esposito: If Your Honor please, at this time the defendant takes exception to the judgment

and sentence and fine of this Court as just rendered, and we move Your Honor for a stay of mittimus as to the payment of this fine and as otherwise adjudged by the Court pending a 48 hour time so that he can file a proper bond for supersedeas and cost bond; that, Your Honor, we are now giving notice that the defendant intends to appeal to the Ninth Circuit Court of [177] Appeals under the law." (Tr. Page 129.)

After filing Notice of Appeal, the defendant became aware that there was no Transcript or Record of the reasons assigned by the defendant to his objections and exceptions to the Court charges, because of the absence of the Recorder and thereupon counsel for the defendant took up the matter with Honorable Delbert E. Metzger, Presiding Judge, in the presence of the United States Assistant District Attorney, Willson C. Moore, and it was ordered as follows:

"Be it remembered that on the 13th day of September, 1939, in the Judge's Chamber, before the Honorable Delbert E. Metzger, Judge, presiding, in the above entitled cause, before the jury retired, to deliberate on the issues and the law of the case, in the presence of Willson C. Moore, Acting United States Attorney, District of Hawaii, in the discussion and settlement of the Government's Requested Instructions 1-11, inclusive, and the Defendant's Requested Instructions 1-25, inclusive, the defendant assigned the following reasons for his objections to

the Court giving the Government's Requested Instructions No. 3A, No. 4, No. 5, No. 6, No. 7, to the jury over objection of the defendant, to wit:

The reasons assigned to support objections and exceptions to the Court giving the Government's Requested Instruction No. 3A, to wit: No evidence to support the aforesaid instruction of ignorance of the law; that it is irrelevant, immaterial and incompetent, and prejudicial to the rights and defense of the defendant, in that it rebutted the presumption of innocence and his defense as disclosed by the evidence.

The reasons assigned to the objections and exceptions [178] of the defendant to the Government's Requested Instruction No. 4, to wit: That said instruction is not law, in that it is part of Section 6 of the Act of Congress of December 17, 1914, and not the total of the requirement of Section 6, therefore, incomplete, inaccurate and prejudicial to rights of the defendant and misleading to the jury; further, that charge failed to instruct on Section 2A of said Act.

The reasons assigned to the objections and exceptions of the defendant to the Government's Requested Instruction No. 5, to wit: That said instruction fails to include Articles 179, 180, 181, 182, 183, and 184 of Regulation No. 5 of U. S. Treasury Department, Bureau of Narcotics which are essential and necessary to the defense of the defendant, therefore, misleading to the jury and prejudicial to rights of the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Government's Requested Instruction No. 6, to wit: inaccurate, incomplete, argumentative and commenting on the evidence prejudicial to the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Government's Requested Instruction No. 7, to wit: irrelevant and immaterial, misleading to the jury and prejudicial to the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give the Defendant's Requested Instruction No. 1, to wit: That there is no substantial evidence to prove defendant guilty of any crime or offense.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give Defendant's [179] Requested Instruction No. 2, to-wit: verbatim Section 6 of the Act and necessary upon the evidence of the defense; its refusal is prejudicial to the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give Defendant's Requested Instruction No. 3, to wit: That said instruction is necessary upon the evidence of the defense, that the keeping of a record is not essential if the defendant was upon personally attendance of patients, when said drugs were dispensed; its refusal by the Court is prejudicial to the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give Defendant's Requested Instruction No. 4, to wit: That said instruction is necessary upon the evidence of the defendant and his Exhibits "A" to "J" inclusive; its refusal is prejudicial to the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give Defendant's Requested Instructions No. 5, No. 6, No. 7, No. 8, No. 9, and No. 10, to wit: That all of said Defendant's Requested Instructions are essential and necessary to explain the intent and purpose of Section 6 of said Act; further to amplify and explain Article 185 of Regulation No. 5 given by the Court in its charge; the Court's refusal to give said instructions above mentioned is prejudicial to the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give Defendant's Requested Instructions No. 11, No. 12, and No. 13, to wit: that said instructions are necessary to explain the purpose [180] of the Act and the refusal to give them, is prejudicial to the rights of the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give the defendant's Requested Instruction No. 14, to wit: That said instruction is the law upon the issues as provided in Section 6, and is necessary; that the refusal to give the same is prejudicial to the rights of the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give the defendant's Requested Instruction No. 15, to wit: That said instruction is the law as provided by the Act and necessary upon the evidence; its refusal is prejudicial to the rights of the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give the defendant's Requested Instructions Nos. 16 and No. 17, to wit: That said instructions are the law as provided by the Act and not covered in the charge of the Court and necessary upon evidence of the defense; the Court's refusal to give the aforesaid two instructions is prejudicial to the rights of the defendant.

The reasons assigned to the objections and exceptions of the defendant to the Court's refusal to give the defendant's Requested Instructions No. 23 and No. 25, to wit: That said instructions are the law upon the evidence not covered in the charge of the Court; their refusal by the Court misleading to the jury, and is prejudicial to the rights of the defendant.

In view of the foregoing, it is hereby ordered, that the reasons assigned by the defendant to support the objections [181] and exceptions to the Court giving the Government's Requested Instructions above mentioned, and to the Court refusing to give the defendant's Requested Instructions above mentioned, be hereby filed and incorporated in the above

entitled court and cause, as part of the record therein." Filed, September 29, 1939.

Enclosed is the Court's Charge to the jury, to wit:
UNITED STATES INSTRUCTION No. 1-A

"A criminal prosecution begins with the presumption that the defendant, although accused, is innocent, and that to overcome this legal presumption the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. The presumption of innocence is evidence created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. The benefit of this presumption attends the accused at every stage of the proceedings and stands as his sufficient protection unless and until it has been removed by evidence proving his guilt beyond a reasonable doubt."

UNITED STATES INSTRUCTION No. 2

"In this case the burden of proof is upon the United States, and, to entitle it to a conviction of the defendant, the United States must prove every material element of the offense, to the satisfaction of each member of the jury and beyond a reasonable doubt. If any of you entertain a reasonable doubt of the defendant's guilt as to any material element of the offense, it is your sworn duty to vote for an

acquittal as to such offense, otherwise to vote for conviction." [182]

DEFENDANT'S INSTRUCTION No. 22

"The burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.

Under the law no jury can convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can be convicted of crime is not suspicion, not mere probabilities, but proof which exclude all reasonable doubt of his innocence."

DEFENDANT'S INSTRUCTION No. 20

"The indictment in this case is a mere accusation and is not of itself any evidence, not the slightest, of the defendant's guilt, and no juror should permit himself to be to any extent influenced because or on account of the indictment against the defendant. You are instructed that the defendant

is presumed by the law to be innocent of the crime charged against him, in each and all its parts, and this presumption shields and protects him throughout each and every stage of the trial until overcome by satisfactory evidence, which convinces you of his guilt as charged beyond all reasonable doubt."

UNITED STATES INSTRUCTION No. 3

"You are instructed that in every crime, as in this case, [183] there must be an intent on the part of the defendant to commit the crime and if you are not satisfied beyond all reasonable doubt that the defendant had the intent to commit the crime alleged in the indictment, then your verdict must be not guilty; in this connection, however, you are instructed that, under the law, a person is always presumed to intend the natural and probable consequences of his acts."

DEFENDANT'S INSTRUCTION No. 19

"I instruct you that the issue which you are to try is that presented by the indictment, and the defendant's plea of not guilty in this case. For be it remembered, that the plea of not guilty puts in issue and requires the prosecution to prove each and every material allegation in the indictment beyond all reasonable doubt."

UNITED STATES INSTRUCTION No. 4

"You are instructed that Counts III to X, inclusive, of this indictment allege the failure to keep records covering distribution of exempt preparations having a limited narcotic content. The applicable provision of the statute which covers the same is as follows:

"That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupois ounce, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner, with the approval of the Secretary, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose.'" §1041 (a), Title 26, U. S. C. [184]

UNITED STATES INSTRUCTION No. 5

"You are instructed that Article 185, Regulations No. 5, of the U. S. Treasury Department, Bureau of Narcotics, provides 'Every manufacturer, producer, compounder, or vendor (including dispensing physician), of exempt preparations * (in this case Analgesic No. 1, Paregoric, Linctus Compound, Syrup-Codeine Phosphate, Sedatole, Camosalide Tablets, Stokes Expectorant, Syrup Eucillana Compound, and Expectorant #6) shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery'. The form of these records shall give (1) the date, (2) registration number of recipient, (3) name of recipient, (4) address, (5) name of preparation, and (6) the quantity."

*This parenthesis added.

DEFENDANT'S INSTRUCTION No. 9

"I instruct you that Article 184 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

'Art. 184. Dispositions to consumers.— Preparations or remedies which are within the exemption may be sold with or without prescriptions, and a prescription for such a preparation may be refilled provided, of course, the preparation is furnished in good faith for medicinal purposes only. The filling or re-

filling of narcotic prescriptions calling for more than one exempt preparation or a mixture consisting of an exempt preparation or remedy further reduced or diluted by the addition of non-narcotic medicinal agents is authorized, provided, of course, the preparation is furnished in good faith for medicinal purposes.

‘An extemporaneous prescription calling for narcotic drugs not in excess of the amounts specified in section 6 may be refilled in the same manner as a prescription calling for ready-made preparations or remedies, provided the mixture is sold in good faith for medicinal purposes only, [185] and a record is kept of the sale in the manner indicated in Article 185.’”

DEFENDANT'S INSTRUCTION No. 18

“I instruct you, that the Act does not provide what drug or preparation a physician may prescribe or dispense to a patient, nor does it say the quantity which a physician may or may not prescribe, nor does it regulate the frequency of the prescription or the dispensation of the drug, to the patient, the wisdom or propriety of such treatment of said patient is left to the discretion and judgment of the physician, provided he acts in good faith, and in the course of his professional practice only.”

U. S. v. Anthony, 15 Fed. Supp. 535;

Linder v. U. S., 268 U. S. 5.

UNITED STATES INSTRUCTION No. 6

"You are instructed that where a count of the indictment charges two or more acts as constituting the offense, it is not necessary that you should find the defendant to have committed all of said acts in order to find him guilty of the offense charged; it is sufficient if you find from the evidence that he committed any of the said acts as charged.

By way of illustration: The counts of this indictment charge that the defendant between August 26, 1937 and July 21, 1939, both dates inclusive, sold, distributed, dispensed and gave away preparations and remedies which did not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce, and that said defendant knowingly, willfully, unlawfully, and feloniously failed to keep records of all of said (1) sales, (2) distributions, (3) dispensations, and (4) gifts of such preparations and remedies. To meet the re- [186] quired burden as to the counts of this indictment the Government need only prove in the manner required by these instructions that the defendant failed to keep records as to any of said alleged acts."

UNITED STATES INSTRUCTION No. 7

“The Court instructs the jury that evidence is of two kinds—direct and circumstantial. Direct evidence is when a witness testified directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts, which usually and reasonably follow, according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct testimony of eye-witnesses; but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant’s innocence.”

UNITED STATES INSTRUCTION No. 3-A

“Gentlemen of the Jury, you are instructed that ignorance of the law is no excuse.”

UNITED STATES INSTRUCTION No. 8

“If you can reconcile the evidence with any reasonable hypothesis consistent with the defendant’s innocence, it is your duty to do so and in that case to find him not guilty, for every reasonable doubt is to be resolved in favor of a defendant, and it is not sufficient that the circumstances coincide with,

account for and therefore render probable the guilt of the [187] defendant. They must exclude to a moral certainty every other reasonable hypothesis."

UNITED STATES INSTRUCTION No. 9

"The Court further instructs you, Gentlemen of the Jury, that you are the exclusive judges of the credibility of the witnesses, of the weight of the evidence and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor or frankness, or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given the testimony of the witnesses, you are authorized to consider their relationship to the party, if any; their interest, if any, in the result of this case; their temper, feeling or bias, if any has been shown; their demeanor on the witness stand; their means and opportunity of information, and the probability or improbability of the story told by them.

If you find and believe from the evidence that any witness in this case has knowingly or willfully sworn falsely to any material fact in this trial, or that any witness has knowingly and willfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, misleading or imposing upon you, then you have a right to reject the entire testimony of such witness, except in-

so far as the same is corroborated by other credible evidence or believed by you to be true."

DEFENDANT'S INSTRUCTION No. 21

"A reasonable doubt is that state of the mind which [188] after a full comparison and consideration of all of the evidence both for the United States and the defense, leaves the minds of the jury in that condition that they cannot say that they feel an abiding faith amounting to a moral certainty from the evidence in the case, that the defendant is guilty of the crime as laid in the indictment. If you have such doubt and if your conviction of the defendant's guilt as laid in the indictment does not amount to a moral certainty from the evidence in the case, then you must find the defendant not guilty."

DEFENDANT'S INSTRUCTION No. 24

"I further instruct you, as a matter of law, that one accused and on trial charged with the commission of a crime may testify in his own behalf, or not, as he pleases. You are instructed that when a defendant does testify in his own behalf, then you have no right to disregard his testimony merely because he is accused of crime; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and

subjected to the same tests as are legally applied to any other witness."

UNITED STATES INSTRUCTION No. 11

"Finally, Gentlemen of the Jury, if after deliberately considering all the facts and circumstances in the case and carefully weighing the evidence you find from the evidence and to your satisfaction beyond all reasonable doubt the allegations in the indictment have been established, it is your duty to return a verdict of guilty, otherwise it is equally your duty to return a verdict of not guilty." [189]

ASSIGNMENTS OF ERROR

Assignment I.

The Court erred in overruling and denying, at the close of the Government's case, the defendant's oral motion to instruct the jury, peremptorily, to return a verdict of not-guilty in behalf of the defendant and for the following reasons:

1. That the facts set forth and alleged in the Indictment, and in any and every Count thereof, fail to state facts sufficient to show that the defendant has violated any law of the United States of America; or that the defendant is guilty of any crime or offense; or that the defendant has violated any of the requirements or provisions of the so-called Harrison Anti-Narcotic Act, also known as the Act of

Congress of December 17, 1914 and its Amendments and that therefore, every Count of the Indictment is fatally defective; further that each and every Count of the Indictment affirmatively alleges and the evidence affirmatively shows that the defendant did not violate any law of the United States of America and did not violate Section 6 nor Section 9 of the aforesaid Act or its Amendments.

2. Assuming that, if said facts as stated, and alleged, in each and every Count of the Indictment, are within the requirements and provisions of said Section 6 and Section 9, of said Act, (also known as Section 1041 and Section 1047 of Title 26, United States Code,) then to that extent and to that interpretation, the said Harrison Anti-Narcotic Act and its Amendments, is invalid and unconstitutional because it is in violation of Article 10 of the Amendments of the United States Constitution, in that said Section 6 and Section 9, is an attempt by Congress to exert powers not delegated to it, by the United States Constitution and its Amendments; further that said Section 6 and Section 9 of said Act, as interpreted by the Court, is an [190] infringement upon, and violation of, the police powers as guaranteed to every state, and to the Territory of Hawaii by the United States laws, in that, it is a regulation of the practice of medicine affecting and appertaining to physicians and surgeons and therefore unconstitutional.

3. That said Section 6 of said Act, as interpreted and ruled by the Court, is inconsistent with and con-

trary to Section 2-A of the said same Act of Congress of December 17, 1914 and its Amendments, in that, the said Section 6 of said Act, fails to provide for the exception of keeping records of narcotic drugs dispensed by a physician, dentist or veterinary surgeon,—“such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend,” and as it is excepted by the provisions of Section 2A of said Act, the so-called Harrison Anti-Narcotic Act, and therefore the said Section 6 as interpreted by the Court is invalid and unconstitutional for the reason that said Section 2A of said Act has already been declared valid and constitutional by the United States Supreme Court.

4. That the said Section 6 and Section 9 of the said Act, aforesaid are a violation of the “due process clause” of the United States Constitution and its Amendments, in that it is a Statute or Act, which forbids or requires the doing of an act in terms so vague, indefinite, uncertain and ambiguous, that men of common intelligence must necessarily guess at the meaning of the Act and differ as to the application thereof.

5. That the said Section 6 and Section 9 of the same said Act do not constitute or make an offense or crime against the United States of America, the MERE FAILURE to keep a record of exempt drugs, which are dispensed as medicine and not with the intent to evade the provisions of the Act by a physician who is [191] duly licensed and registered to

practice medicine and who has paid his federal narcotic tax fee, according to law, when the said exempt drugs according to law, are dispensed and distributed by said physician in good faith to patients, as medicine, in the course of his professional practice only, as the uncontradicted evidence adduced discloses that the defendant did, and as alleged in all the Counts of the Indictment.

6. That the intent and purpose of the legislators, in enacting Section 6 of the *Act Congress* of December 17, 1914 and its Amendments, was to exempt certain drugs which contained small amounts of opium or its derivatives, which amounts are enumerated specifically in, said Section 6, **FROM TAXATION** if certain condition precedents were complied: (1) if said exempt drugs were sold or dispensed as medicines and not with intent to evade the provisions of the Act; (2) if a written record was made of said distribution, sale and dispensation; (3) if the said record was kept for at least a period of two years; (4) and if such druggist, physician, dentist and veterinary surgeon was registered and paid his tax.

If the aforesaid exempt drugs were dispensed or sold as aforesaid, then said exempt drugs were free from being taxed like opium, morphine and its derivatives and then all the provisions of the Harrison Anti-Narcotic Act were not to be construed, as applying to said exempt drugs, but if anyone of said statutory conditions were not complied with, then all the provisions of the Act applied and said

exempt drugs became taxable like non-exempt drugs—and before a person was guilty of an offense, he would have to violate Section 2A or any of the other provisions of the same said Act.

A violation of a condition so that an exemption of the statutory provisions may attach and apply is not an offense or [192] crime against the United States of America when not specifically made an offense by the provisions of the Act, for the reason that there is no common law offense or crime against the United States of America; (2) for the reason that the Harrison Anti-Narcotic Act is a revenue act for taxing narcotics ~~and not~~ a penal or criminal Act; (3) when Congress enacts a new crime by Act, it must be clear, definite and specific and fairly apprise men of common intelligence of the nature and substance of the offense created: this the provisions of the Harrison Anti-Narcotic Act, have failed to provide.

Which motion for a directed verdict was made by the defendant through his counsel at the close of the government's case, and concerning which extended argument was heard by the Court from both parties to this action, and the said motion was denied by the Court in the presence of the jury, to which denial of the defendant's Motion for a directed verdict the defendant in the presence of the jury duly excepted, for the reasons assigned in the oral argument:

The Court: Motion denied.

Mr. Esposito: Exception for the reasons stated.
(Record page)

Assignment II.

The Court erred in overruling and denying, at the close of all the evidence after all the parties had rested, the defendant's oral motion to instruct peremptorily the jury, to return a verdict of not guilty and to discharge the defendant upon the indictment and the evidence adduced in support thereof and for the following reasons:

1. That the facts set forth and alleged in the Indictment, and in any and every Count thereof, fail to state facts sufficient to show that the defendant has violated any law of the United States of America; or that the defendant is guilty of any crime [193] or offense; or that the defendant has violated any of the requirements or provisions of the so-called Harrison Anti-Narcotic Act, also known as the Act of Congress of December 17, 1914 and its Amendments and that therefore, every Count of the Indictment is fatally defective; further that each and every Count of the Indictment affirmatively alleges and the evidence affirmatively shows that the defendant did not violate any law of the United States of America and did not violate Section 6 nor Section 9 of the aforesaid Act or its Amendments.

2. Assuming that, if said facts as stated, and alleged, in each and every Count of the Indictment, are within the requirements and provisions of said Section 6 and Section 9, of said Act, (also known as Section 1041 and Section 1047 of Title 26, United States Code,) then to that extent and to that inter-

pretation, the said Harrison Anti-Narcotic Act and its Amendments, is invalid and unconstitutional because it is in violation of Article 10 of the Amendments of the United States Constitution, in that said Section 6 and Section 9 is an attempt by Congress to exert powers not delegated to it, by the United States Constitution and its Amendments; further that said Section 6 and Section 9 of said Act, as interpreted by the Court, is an infringement upon, and violation of, the police powers as guaranteed to every state, and to the Territory of Hawaii by the United States laws, in that, it is a regulation of the practice of medicine affecting and appertaining to physicians and surgeons and therefore unconstitutional.

3. That said Section 6 of said Act, as interpreted and ruled by the Court, is inconsistent with and contrary to Section 2A of the said same Act of Congress of December 17, 1914 and its Amendments, in that, the said Section 6 of said Act, fails to provide for the exception of keeping records of narcotic drugs [194] dispensed by a physician, dentist or veterinary surgeon,—‘such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend,’ and as it is excepted by the provisions of Section 2A of said Act, the so-called Harrison Anti-Narcotic Act, and therefore the said Section 6 as interpreted by the Court is invalid and unconstitutional for the reason that said Section 2A of said

Act has already been declared valid and constitutional by the United States Supreme Court.

4. That the said Section 6 and Section 9 of the said Act, aforesaid are a violation of the 'due process clause' of the United States Constitution and its Amendments, in that it is a Statute or Act, which forbids or requires the doing of an act in terms so vague, indefinite, uncertain and ambiguous, that men of common intelligence must necessarily guess at the meaning of the Act and differ as to the application thereof.

5. That the said Section 6 and Section 9 of the same said Act do not constitute or make an offense or crime against the United States of America, the **MERE FAILURE** to keep a record of exempt drugs, which are dispensed as medicine and not with the intent to evade the provisions of the Act by a physician who is duly licensed and registered to practice medicine and who has paid his federal narcotic tax fee, according to law, when the said exempt drugs according to law, are dispensed and distributed by said physician in good faith to patients, as medicine, in the course of his professional practice only, as the uncontradicted evidence adduced discloses that the defendant did, and as alleged in all the Counts of the Indictment.

6. That assuming the most favorable interpretation, with all its reasonable attending inferences, to the evidence adduced by the United States Government against this defendant, yet the [195] hypothesis of innocence applies to all the evidence, and

the defendant should be discharged as a question of law.

7. That the intent and purpose of the legislators, in enacting Section 6 of the Act of Congress of December 17, 1914 and its Amendments, was to exempt certain drugs which contained small amounts of opium or its derivatives, which amounts are enumerated specifically in said Section 6, FROM TAXATION if certain condition precedents were complied: (1) if said exempt drugs were sold or dispensed as medicines and not with the intent to evade the provisions of the Act; (2) if a written record was made of said distribution sale and dispensation; (3) if the said record was kept for at least a period of two years; (4) and if such druggist, physician, dentist and veterinary surgeon was registered and paid his tax.

If the aforesaid exempt drugs were dispensed or sold as aforesaid, then said exempt drugs were free from being taxed like opium, morphine and its derivatives and then all the provisions of the Harrison Anti-Narcotic Act were not to be construed as applying to said exempt drugs, but if any one of said statutory conditions were not complied with, then all the provisions of the Act applied and said exempt drugs became taxable like non-exempt drugs—and before a person was guilty of an offense, he would have to violate Section 2A or any of the other provisions of the same said Act.

A violation of a condition so that an exemption of the statutory provisions may attach and apply is

not an offense or crime against the United States of America when not specifically made an offense by the provisions of the Act, for the reason that there is no common law offense or crime against the United States of America; (2) for the reason that the Harrison Anti-Narcotic Act is a revenue act for taxing narcotics and not a [196] penal or criminal Act; (3) when Congress enacts a new crime by Act, it must be clear, definite and specific and fairly apprise men of common intelligence of the nature and substance of the offense created:—this the provisions of the Harrison Anti-Narcotic Act, have failed to provide.

Which motion for a directed verdict was made by the defendant in the presence of the jury, at the conclusion of the case, after all the parties have rested and which said motion the Court denied, and the defendant in the presence of the jury duly excepted:

The Court: Motion denied.

Mr. Esposito: Exception for the reasons stated.
(Record Page)

Assignment III.

The Court erred in instructing the jury as requested by the United States, in the United States Requested Instruction No. 3A:

The Court: Gentlemen of the Jury, you are instructed that ignorance of the law is no excuse.

To the giving of the instruction above set out, the defendant objected, and stated his reasons therefor

orally in the Judge's Chambers in the presence of the United States District Attorney, after argument was had upon the same, to wit: No evidence to support the aforesaid instruction of ignorance of the law; that it is irrelevant, immaterial and incompetent, and prejudicial to the rights and defense of the defendant, in that it rebutted the presumption of innocence and his defense as disclosed by the evidence; later the defendant, at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, duly excepted:

Mr. Esposito: The defendant takes exception to the Court giving over objection of the defendant the Government's [197] Requested Instruction No. 3A.

The Court: Exception allowed. (Record page)

Assignment IV.

The court erred in instructing the jury as requested by the United States, in the United States Requested Instruction No. 4:

The Court: You are instructed that Counts III to X, inclusive, of this indictment allege the failure to keep records covering distribution of exempt preparations having a limited narcotic content. The applicable provisions of the statute which covers the same is as follows:

‘That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies * * *

which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce, * * * shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner, with the approval of the Secretary, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose. * * *

§1041 (a). Title 26, U. S. C.

To the giving of the instruction above set out, the defendant objected, and stated his reasons therefor orally in the Judge's Chambers in the presence of the United States District Attorney, after argument was had upon the same, to wit: That said instruction is not law, in that it is part of Section 6 of the Act of Congress of December 17, 1914, and not the total of the requirement of Section 6, therefore, incomplete, inaccurate and prejudicial to the rights of the defendant and misleading to the jury; further, that the charge failed to instruct on Section 2A of said Act; later the [198] defendant, at the conclusion of the charge of the Court, in the pres-

ence of the jury, before the jury retired, duly excepted:

Mr. Esposito: The defendant takes exception to the Court giving over objection of the defendant the Government's Requested Instruction No. 4.

The Court: Exception allowed. (Record page)

Assignment V.

The court erred in instructing the jury as requested by the United States, in the United States Requested Instruction No. 5:

The Court: You are instructed that Article 185, Regulations No. 5, of the U. S. Treasury Department, Bureau of Narcotics, provides "Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations * (in this case Analgesic No. 1, Paregoric, Linctus Compound, Syrup, Codeine Phosphate, Sedatole, Camsalide Tablets, Stokes Expectorant, Syrup Eucillana Compound, and Expectorant #6) shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery". The form of these records shall give (1) the date, (2) registration number of recipient, (3) name of recipient, (4) address, (5) name of preparation, and (6) the quantity.

*This parenthesis added.

To the giving of the instruction above set out, the defendant objected; and stated his reasons therefor orally in the Judge's Chambers in the presence of the United States District Attorney, after argu-

ment was had upon the same, to wit: that said instruction fails to include Articles 179, 180, 181, 182, 183, and 184 of Regulation No. 5 of U. S. Treasury Department, [199] Bureau of Narcotics, which are essential and necessary to the defense of the defendant, therefore, misleading to the jury and prejudicial to the rights of the defendant; later the defendant, at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, duly excepted:

Mr. Esposito: The defendant takes exception to the Court giving over objection of the defendant the Government's Requested Instruction No. 5.

The Court: Exception allowed. (Record page)

Assignment VI.

The court erred in instructing the jury as requested by the United States, in the United States Requested Instruction No. 6:

The Court: You are instructed that where a count of the indictment charges two or more acts as constituting the offense, it is not necessary that you should find the defendant to have committed all of said acts in order to find him guilty of the offense charged; it is sufficient if you find from the evidence that he committed any of the said acts as charged. By way of illustration: The counts of this indictment charge that the defendant between August 26, 1937 and July 21, 1939, both dates inclusive, sold, distributed, dispensed and gave away preparations and remedies which did not contain more than two

grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce, and that said defendant knowingly, [200] willfully, unlawfully, and feloniously failed to keep records of all of said (1) sales, (2) distributions, (3) dispensations, and (4) gifts of such preparations and remedies. To meet the required burden as to the counts of this indictment the Government need only prove in the manner required by these instructions that the defendant failed to keep records as to any of said alleged acts.

To the giving of the instruction above set out, the defendant objected, and stated his reasons therefor orally in the Judge's Chambers in the presence of the United States District Attorney, after argument was had upon the same, to wit:—inaccurate, incomplete, argumentative and commenting on the evidence prejudicial to the defendant; later the defendant, at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, duly excepted.

Mr. Esposito: The defendant takes exception to the Court giving over objection of the defendant the Government's Requested Instruction No. 6.

The Court: Exception allowed. (Record page)

Assignment VII.

The court erred in instructing the jury as requested by the United States, in the United States Requested Instruction No. 7:

The Court: The Court instructs the jury that evidence is of two kinds—direct and circumstantial. Direct evidence is when a witness testified directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected [201] facts, which usually and reasonably follow, according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct testimony of eye-witnesses; but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence.

To the giving of the instruction above set out, the defendant objected, and stated his reasons therefor orally in the Judge's Chambers in the presence of the United States District Attorney, after argument was had upon the same, to wit:—irrelevant and immaterial, misleading to the jury and prejudicial to the defendant; later the defendant, at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, duly excepted:

Mr. Esposito: The defendant takes exception to the Court giving over objection of the defendant the Government's Requested Instruction No. 7.

The Court: Exception allowed. (Record page)

Assignment VIII.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "That there is no substantial evidence to prove defendant guilty of any crime or offense," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the defendant's Requested Instruction No. 1 as follows:

Defendant's Requested Instruction No. 1

"Gentlemen of the Jury, I instruct you to find the defendant not guilty as charged on all the Counts of the [202] Indictment."

Upon the Court refusing to give the defendant's Requested Instruction No. 1 above set out, the defendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and, before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court's decision in refusing to give to the jury; in its charge and instructions, the Defendant's Requested Instruction No. 1.

The Court: Exception allowed. (Record page)

Assignment IX.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "verbatim Section 6 of the Act and necessary upon the evidence of the defense; its refusal is prejudicial to the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the defendant's Requested Instruction No. 2, as follows:

Defendant's Requested Instruction No. 2

"I instruct you, that the Act of December 17, 1914, as amended, and known as the 'Harrison Anti-Narcotic Act' is an Act passed by Congress to enforce a tax or revenue upon 'every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium, or coca leaves, or any compound, manufacture, salt derivative or preparation thereof, shall register with the collector of internal revenue of the district, his name or style, place of business and place or places where such business is to be carried on and pay the special taxes hereinafter provided:—' that Section 6 of said Act is as follows: [203]

'That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine,

or more than one-eighth of a grain of heroin, or more than one grain of codeine or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: PROVIDED, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: PROVIDED FURTHER, that any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned, in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose and the State, Territorial, District, mu-

nicipal, and insular officers named in Section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.' "

Upon the court refusing to give the Defendant's Requested Instruction No. 2 above set out, the defendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court's decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested [204] Instruction No. 2.

The Court: Exception allowed. (Record page)

Assignment X.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "That said in-

struction is necessary upon the evidence of the defense, that the keeping of a record is not essential if the defendant was upon personal attendance of patients, when said drugs were dispensed; its refusal by the Court is prejudicial to the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 3, as follows:

Defendant's Requested Instruction No. 3.

"I instruct you that Sect. 2 of said Act is as follows:

'Section 2(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: PROVIDED, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.' "

Upon the Court refusing to give the Defendant's Requested Instruction No. 3 above set out, the defendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 3. [205]

The Court: Exception allowed. (Record page)

Assignment XI.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit: "That said instruction is necessary upon the evidence of the defendant and his Exhibits "A" to "J" inclusive; its refusal is prejudicial to the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 4, as follows:

Defendant's Requested Instruction No. 4

"I instruct you that Article 179 of the U. S. Treasury Department, Bureau of Narcotics, Regulations No. 5, Relating to the Importation, Manufacture, Production, Compounding, Sale, Dealing in, Dispensing and Giving of Opium or Coca Leaves, or any Compound, manufacture, salt derivative or preparation thereof passed by H. J. An-

slinger, Commissioner of Narcotics, Guy T. Helvering, Commissioner of Internal Revenue, Approved, June 1, 1938, by Wayne C. Taylor, Acting Secretary of the Treasury, provides as follows:

'Art. 179. Stock preparations—A practitioner who, in his office practice administers minute quantities of narcotics in stock preparations, may keep, as to such preparations, in lieu of the record required by Art. 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted.' "

Upon the Court refusing to give the Defendant's Requested Instruction No. 4 above set out, the defendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its [206] charge and instructions, the Defendant's Requested Instruction No. 4.

The Court: Exception allowed. (Record page —.)

Assignment XII.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "That the said Defendant's Requested Instruction is essential and necessary to explain the intent and purpose of Section 6 of said Act; further to amplify,

and explain Article 185 of Regulation No. 5 given by the Court in its charge; the Court's refusal to give said instruction above mentioned is prejudicial to the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 5, as follows:

Defendant Requested Instruction No. 5.

"I instruct you that Article 180 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

'Art. 180. Extent of exemption.—The section of the law last quoted has the effect of conditionally exempting from liability under the other sections of the act persons manufacturing and dealing in certain narcotic preparations or remedies. Such persons are, however, subject to certain requirements laid down in section 6, Manufacturers of and dealers in exempt preparations are required to register as such whether liable to tax in that capacity or not. (See Art. 13 as to tax liability.)

'Preparations containing cocaine or pantopon in any quantity, whether for internal or external use, are not within section 6 but are subject to all other provisions of the act.'"

Upon the Court refusing to give the Defendant's Requested Instruction No. 5 above set out, the de-

fendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court [207] decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 5.

The Court: Exception allowed. (Record, page)

Assignment XIII.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons; to wit, "that the said Defendant's Requested Instruction is essential and necessary to explain the intent and purpose of Section 6 of said Act; further to amplify and explain Article 185 of Regulation No. 5 given by the Court in its charge; the Court's refusal to give said instruction above mentioned is prejudicial to the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 6, as follows:

Defendant's Requested Instruction No. 6.

"I instruct you that Article 181 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

Art 181. Standards of exemption.—preparations designed for or capable of internal

use to be exempt shall not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce. The preparation shall contain active medicinal drugs other than narcotics in sufficient proportion to confer upon the preparation valuable medicinal qualities other than those possessed by the narcotic drug alone. Use for aural, nasal, ocular, rectal, urethral, or vaginal purposes is not regarded as external use and, therefore, preparations manufactured or used for such purposes containing more than the percentages of narcotic drugs as above indicated are not within the exemption.

“There is no limitation upon the percentage of narcotic drugs external preparations may [208] contain. In order to be within the exemption a preparation for external use, containing more than the maximum percentage of narcotic drugs above specified, shall contain ingredients rendering it unfit for internal administration.”

Upon the Court refusing to give the Defendant's Requested Instruction No. 6 above set out, the defendant, by his counsel, at the conclusion of the

charge of the Court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 6.

The Court: Exception allowed. (Record page).

Assignment XIV.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that the said Defendant's Requested Instruction is essential and necessary to explain the intent and purpose of Section 6 of said Act; further to amplify and explain Article 185 of Regulation No. 5 given by the Court in its charge; the Court's refusal to give said instruction above mentioned is prejudicial to the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 7, as follows:

Defendant's Requested Instruction No. 7.

"I instruct you that Article 182 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

'Art. 182. Restrictions on dispositions.—A preparation conforming to the standards set out in article 181 is exempt from stamp tax

and the requirements pertaining to taxable narcotics only when manufactured, sold, distributed, given away, dispensed, or possessed as a medicine. A manufacturer [209] may produce and sell as exempt only preparations readily capable of use for claimed medicinal purpose and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended.' "

Upon the Court refusing to give the Defendant's Requested Instruction No. 7 above set out, the defendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instruction, the Defendant's Requested Instruction No. 7.

The Court: Exception allowed. (Record page

Assignment XV.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "That the said Defendant's Requested Instruction is essential and necessary to explain the intent and purpose of Sec-

tion 6 of said Act; further to amplify and explain Article 185 of Regulation No. 5 given by the Court in its charge; the Court's refusal to give said instruction above mentioned is prejudicial to the defendant," was assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 8, as follows:

Defendant's Requested Instruction No. 8.

"I instruct you that Article 183 of the U. S. Treasury Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

'Art. 183. Dispositions to dealers.—Orders for exempt preparations except where sold to a [210] registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer unless it bears the registry number of the dealer giving the order. (See Articles 100, 105 and 111, relative to orders received from the Virgin Islands, Puerto Rico and the Philippine Islands, respectively.)

'Where orders for exempt preparations are taken by a traveling salesman the salesman shall ascertain the registry number of the purchaser. The order shall not be filled by the manufacturer or vendor unless she knows the purchaser's registry number.'"

Upon the Court refusing to give the Defendant's Requested Instruction No. 8 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 8.

The Court: Exception allowed. (Record page)

Assignment XVI.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that the said Defendant's Requested Instruction is essential and necessary to explain the intent and purpose of Section 6 of said Act; further to amplify and explain Article 185 of Regulation No. 5 given by the Court in its charge; the Court's refusal to give said instruction above mentioned is prejudicial to the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 10, as follows:

Defendant's Requested Instruction No. 10.

"I instruct you that Article 185 of the U. S. Treasury [211] Department, Bureau of Narcotics, Regulation No. 5 provides as follows:

Art. 185, Records required.—Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

Forms are not furnished for the keeping of these records, but the records shall be in the following form:

Form of record of dispositions to registrants

Date—

Registration No. of recipient—

Name of recipient—

Add.—

Name of Prep.—

Qty.—

Form of record of dispositions to Consumers

Date—

Name of recipient—

Add.—

Name of Prep.—

Qty.—

‘In the case of manufacturers of or dealers in exempt preparations who are also registered as manufacturers of or dealers in taxable drugs in Class I or II, the foregoing requirements as to records of dispositions to registrants shall be deemed to be complied with, if all such dispositions are evidenced by vouchers or invoices containing all the required information and such vouchers or invoices are kept in a separate file arranged chronologically.’ ”

Upon the Court refusing to give the Defendant's Requested Instruction No. 10 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 10. [212]

The Court: Exception allowed. (Record page

Assignment XVII.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, “that said instruction is necessary to explain the purpose of the

Act and the Refusal to give it, is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 11, as follows:

Defendant's Requested Instruction No. 11

"I instruct you that under the Harrison Anti-Narcotic Act, the dispensing of narcotics as medicine by a physician is not limited to immediate need and the physician can give, prescribe, or dispense to a patient a sufficient quantity for self administration in the light of the particular need of the particular occasion depending upon all the symptoms, conditions and circumstances of the case."

U. S. v. Anthony 15 Fed. Supp. 553.

Linder v. U. S., 268 U. S. 5-18

Boyd v. U. S., 271 U. S. 104.

Upon the Court refusing to give the Defendant's Requested Instruction No. 11 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 11.

The Court: Exception allowed. (Record page

.....)

Assignment XVIII.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following [213] reasons, to wit, "that said instruction is necessary to explain the purpose of the Act and the Refusal to give it, is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 12, as follows:-

Defendant's Requested Instruction No. 12.

"I instruct you that the Harrison Anti-Narcotic Act must be interpreted as a revenue act only, and not as an Act regulating the disposition and sale of narcotics or regulating medicine."

U. S. v. Anthony, 15 Fed. Supp. 533

Linder v. U. S., 268 U. S. 5.

Upon the Court refusing to give the Defendant's Requested Instruction No. 12 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 12.

The Court: Exception allowed. (Record page

.....)

Assignment XIX.

The Court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that said instruction is necessary to explain the purpose of the Act and the Refusal to give it, is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 13, as follows:

Defendant's Requested Instruction No. 13

"I instruct you that under the Act, a physician may [214] dispense, give away, or deliver to a patient or an addict, in good faith, for self administration medicines, drugs or preparations exempted under Section 6, for the relief of conditions, incident to addiction or for the treatment of disease suffered by the patient."

U. S. v. Anthony 115 Fed. Supp. 553

Linder v. U. S., 268 U. S. 5.

Upon the Court refusing to give the Defendant's Requested Instruction No. 13 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 13.

The Court: Exception allowed. (Record page)

Assignment XX.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that said instruction is the law upon the issues as provided in Section 6, and is necessary; that the refusal to give the same is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 14, as follows:

Defendant's Requested Instruction No. 14.

"I instruct you that if you find, from all the evidence, that the defendant dispensed the drugs and preparations as alleged in all the counts of the indictment as medicines, and not for the purpose of evading the intentions and provisions of this Act, you will find the defendant not guilty." [215]

Upon the Court refusing to give the Defendant's Requested Instruction No. 14 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court charge and instructions, the Defendant's Requested Instruction No. 14.

The Court: Exception allowed. (Record page)

Assignment XXI.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that said instruction is the law as provided by the Act and necessary upon the evidence; its refusal is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 15 as follows:

Defendant's Requested Instruction No. 15.

"I instruct you that if you find, from all the evidence, that the defendant dispensed to patients the drugs and preparations as alleged in all the counts of the indictment, as medicines and in the practice of his profession only, and not for the purpose of evading the intentions and provisions of the Act, and that he failed to keep a record of such dispensations as provided by law, then you may consider, upon all the evidence the exception as provided in Sect. 2A, which provides as follows:

'Sect. 2(a). To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: PROVIDED, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs, dispensed or distributed, showing the [216] amount dis-

pensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.'

And if you find, after considering all the evidence, that the defendant was personally attending patients when he made such dispensation of the medicines and preparations as alleged in all the counts of the indictment, and failed to keep a record of such dispensations, as alleged in all counts of the indictment, because of such personal attendance, while in the practice of his profession and in good faith, you will find the defendant not guilty."

Upon the Court refusing to give the Defendant's Requested Instruction No. 15 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 15.

The Court: Exception allowed. (Record page

.....)

Assignment XXII.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that said instruction is the law as provided by the Act and not covered in the charge of the court and necessary upon evidence of the defense; the Court's refusal to give the aforesaid instruction is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the [217] United States Attorney, the Defendant's Requested Instruction No. 16, as follows:

Defendant's Requested Instruction No. 16.

"I instruct you, if you find from all the evidence, that the defendant dispensed to patients, the drugs and preparations as alleged in all the counts of the indictment as medicines and in the course of his profession only, and not for the purpose of evading the intentions and provisions of the Act, and you further find that he failed to keep a record of such dispensations as alleged in all the counts of the Indictment, because of the fact, that the defendant honestly and in good faith considered such preparations as stock preparations as regulated and provided in Article 179 of Regulations No. 5, which provides as follows: 'Stock preparations,—A practitioner who, in his office practice, administers minute quantities of narcotics in stock preparations, may keep, as to such preparation in lieu of

the record required by Act 177, a record of the date when each stock preparation is made or purchased, and the date when the preparation is exhausted,' and you further find from all the evidence, that the defendant complied with such regulation, as provided in Article 179, then you will find the defendant not guilty."

Upon the Court refusing to give the Defendant's Requested Instruction No. 16 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 16.

The Court: Exception allowed. (Record page) [218]

Assignment XXIII.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit: "That said instruction is the law as provided by the Act and not covered in the charge of the Court and necessary upon evidence of the defense; the Court's refusal to give the aforesaid instruction is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 17, as follows:

Defendant's Requested Instruction No. 17.

"I instruct you that drugs or preparations, as alleged in all the counts, which are dispensed or distributed to a patient by a physician, in the course of his professional practice only, upon whom such physician shall personally attend is a question of fact for your consideration, and in this connection, I instruct you that you must consider all the evidence of this case, in the light of the particular need of the particular occasion, and all the surrounding and attending conditions and circumstances, and if after considering all the evidence, if any, you find that the defendant was personally attending patients when he dispensed or distributed said medicines and preparations as alleged in all the counts of the indictment, and in the course of his professional practice only, and because of said personal attendance upon patients while in the course of his professional practice only, the defendant failed to keep a record of all such drugs dispensed or distributed and the defendant by such omission to keep records did not intend to evade the intentions and provisions of this Act, [219] but honestly and in good faith failed to keep such records as provided by law, because of such personal attendance, then you will find the defendant not guilty."

Upon the Court refusing to give the defendant's Requested Instruction No. 17 above set out, the defendant, by his counsel, at the conclusion of the

charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 17.

The Court: Exception allowed. (Record page)

Assignment XXIV.

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that said instruction is the law upon the evidence not covered in the charge of the Court; its refusal by the Court misleading to the jury and is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 23, as follows:

Defendant's Requested Instruction No. 23.

"The court instructs the jury that in a criminal case, the burden of proof never shifts to the defendant, and in this case the burden of proof remains upon the United States throughout the case to prove the guilt of the defendant, and the burden does not, under any circumstances, shift to the defendant to prove his innocence."

Branson—Sec. 379—pgs. 399-400.

Upon the Court refusing to give the Defendant's Requested [220] Instruction No. 23 above set out, the defendant, by his counsel; at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 23.

The Court: Exception allowed. (Record page)

Assignment XXV..

The court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to wit, "that said instruction is the law upon the evidence not covered in the charge of the Court; its refusal by the Court misleading to the jury and is prejudicial to the rights of the defendant," were assigned by the defendant, through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 25, as follows:

Defendant's Requested Instruction No. 25.

"Each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged before he can under his oath consent to a verdict of conviction. If any of the jurors, after having duly considered all the evidence and after having consulted with his fellow jurymen, entertain such

reasonable doubt, it will be the duty of such juror not to consent to a verdict of guilty."

Terr. v. Buick, 27 Haw. 28.

Upon the Court refusing to give the Defendant's Requested Instruction No. 25 above set out, the defendant, by his counsel, at the conclusion of the charge of the court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito: The defendant also takes exception to the Court [221] decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 25.

The Court: Exception allowed. (Record page)

Assignment XXVI.

The court erred in accepting the verdict of guilty on all counts rendered by the jury against the defendant, for the reason that said verdict is contrary to the law and evidence, to which ruling the defendant duly excepted, in the presence of the jury and before it was dismissed.

Mr. Esposito: We except to the verdict of the jury.

The Court: Exception allowed. (Record page)

Assignment XXVII.

The court erred in rendering judgment, sentence and fine as of record upon the said verdict for the reason that there is no substantial evidence to sustain said verdict judgment, sentence and fine, to which the defendant duly excepted.

Mr. Esposito: Exception to the Judgment, Sentence and Fine of the Court.

The Court: Exception allowed. (Record page)

Assignment XXVIII.

The court erred in denying and overruling the defendant's Motion for a New Trial, as filed of Record, to which ruling of the Court in refusing to grant said motion for a new trial, the defendant then and there duly excepted. (Record page)

Assignment XXIX.

The court erred in rendering Judgment, Sentence and Fine upon said Verdict, as of record, for the reason that the same is contrary to law. [222]

In the United States District Court
for the Territory of Hawaii.

In the Matter of the Continuance of Pending
Cases.

ORDER OF CONTINUANCE

Good Cause Appearing Therefor, It Is Hereby Ordered that all and singular, the causes and/or proceedings of whatsoever nature, criminal and civil, pending and undisposed of before the United States District Court for the Territory of Hawaii, at the April 1939 Term thereof, be, and the same are, and each of them is hereby continued for hearing or other disposition at the October 1939 Term

of said United States District Court, for the Territory of Hawaii.

Dated at Honolulu, T. H., this 6th day of October, 1939.

(Signed) S. C. HUBER

Judge, United States District Court, Territory of Hawaii.

(Signed) D. E. METZGER

Judge, United States District Court, Territory of Hawaii.

[223]

All the pleadings and the Exhibits in the above entitled cause, the Clerk's Minutes, Motions, Verdict, Judgment and Sentence, the Reporter's Transcript of the Testimony, and all the proceedings in said cause, are hereby referred to and incorporated herein, and made a part of this Bill of Exceptions.

The foregoing Bill of Exceptions contains all the material evidence in narrative form, offered and received on the trial of said cause, including all rulings made during the course of the trial which were excepted to by the defendant-appellant and the exceptions allowed by the Court.

Wherefore, the defendant-appellant, Peter Young alias Young Lup, presents this Bill of Exceptions and asks that the same be settled and allowed as true and correct for the alleged errors assigned herein.

Peter Young vs.

Dated at Honolulu, T. H., this 15th day of November, 1939.

**PETER YOUNG alias
YOUNG LUP,**

Defendant-Appellant,

By **JOSEPH V. ESPOSITO
HIRAM L. FONG**

His Attorneys.

Receipt of a copy of the within is hereby acknowledged this 15 day of November, 1939.

(Signed) **WILLSON C. MOORE**

[Endorsed]: Filed Nov. 15, 1939. [224]

[Title of District Court and Cause.]

**NOTICE OF HEARING ON SETTLEMENT
OF BILL**

Please take notice that the defendant-appellant, Peter Young alias Young Lup, will bring on for settlement his proposed bill of exceptions, filed herein on the 15th day of November, 1939, at the court room in the Federal Building in the City and County of Honolulu, Territory of Hawaii, on the 1st day of December, 1939, at the hour of 9:00 o'clock A. M., or as soon thereafter as counsel can be heard.

Dated at Honolulu, T. H., this 15th day of November, 1939.

PETER YOUNG alias

YOUNG LUP,

Defendant-Appellant,

By /s/ JOSEPH V. ESPOSITO

/s/ HIRAM L. FONG

His Attorneys. [226]

Receipt of a copy of the within is hereby acknowledged this 15 day of November, 1939.

(Signed) WILLSON C. MOORE

Ass't. U. S. Attorney.

[Endorsed]: Filed Nov. 15, 1939. [225]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

It appearing to the Court, that it would be inexpedient and cumbersome to reproduce a copy of the United States Exhibit 1 and 3 respectively and Defendant-Appellant's Exhibits "A" to "K", inclusive, it further appearing to the Court, that for the purpose of reviewing this Appeal by Bill of Exceptions, it may be necessary for the Circuit Court of Appeals to inspect the aforesaid Exhibits, the defendant-appellant having outlined in narrative form and incorporated by references the substance of said Exhibits in his Bill of Exceptions;

It is hereby ordered and approved with certification, that the Original Exhibits above mentioned be transported and transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California, for the consideration of this Appeal by the said Circuit Court of Appeals in connection with and as a part of the transcript of the proceedings of the above entitled cause;

And it appearing that the defendant-appellant moved for the directed verdict because of the alleged insufficiency of the [228] evidence presented to constitute a crime against the United States, it is further ordered and approved that the certified Transcript of the evidence containing pages 1 to 130, inclusive, and certified by the official Court Reporter as a full and accurate transcript of the evidence be and is hereby incorporated as part of this Bill of Exceptions;

It further appearing to the Court, that the defendant-appellant, Peter Young alias Young Lup herein, has duly and properly filed in this Court his proposed Bill of Exceptions, in said cause, together with the admission of service of counsel for the United States, of a copy of Notice of the filing and of the proposed Bill of Exceptions, and it further appearing that said proposed Bill of Exceptions contains all the material evidence and rulings and exceptions made during the course of the trial, necessary for the Appeal, and as directed by the

Court, and the same being duly and properly presented to the undersigned, pursuant to the Notice duly given, and the same having been duly considered by the Judge of this Court, who presided at the trial of said cause, and the same appearing to be in all respects complete and proper;

It is Ordered and Certified, that the above and foregoing instrument, denominated Bill of Exceptions, and comprised of pages 1 to 74, inclusive, be and the same is hereby approved, settled and allowed as the Bill of Exceptions, in the above entitled cause, which includes by reference all the Exhibits and the transcript of evidence.

Dated at Honolulu, T. H., this 4th day of December, 1939.

By the Court:

(Signed) D. E. METZGER

Judge of the Above Entitled
Court.

Attest:

[Seal] (Signed) WM. F. THOMPSON JR.

Clerk. [229]

Receipt of a copy of the within is hereby acknowledged this 4th day of December, 1939.

(S) WILLSON C. MOORE

Ass't. U. S. Attorney
Territory of Hawaii.

[Endorsed]: Filed Dec. 5, 1939. [227]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Good Cause Appearing Therefor, the time for filing the record in this case in the United States Circuit of Appeals for the Ninth Circuit, pursuant to the appeal heretofore sued out and allowed, is hereby extended until the 15th day of January, 1940.

Dated at Honolulu, T. H., this 8th day of December, 1939.

/s/ D. E. METZGER

Judge, United States District
Court of the District and
Territory of Hawaii.

Entry of the above Order assented to this 8th day of December, 1939.

/s/ WILLSON C. MOORE [231]

Receipt of a copy of the within is hereby acknowledged this 8th day of December, 1939.

/s/ WILLSON C. MOORE

Ass't U. S. Attorney

[Endorsed]: Filed Dec. 8, 1939. [230]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Good Cause Appearing Therefor, the time for filing the record in this case in the United States Cir-

enit of Appeals for the Ninth Circuit, pursuant to the appeal heretofore sued out and allowed, is hereby extended until the 15th day of February, 1940.

Dated at Honolulu, T. H., this 8th day of January, 1940.

/s/ **D. E. METZGER**

Judge, United States District
Court of the District and
Territory of Hawaii

Entry of the above Order assented to this 10th day of January, 1940.

/s/ **JOHN E. PARKS**

Ass't U. S. Attorney. [233]

Receipt of a copy of the within is hereby acknowledged this 10th day of January, 1940.

/s/ **JOHN E. PARKS**

Ass't U. S. Attorney

[Endorsed]: Filed Jan. 10, 1940. [232]

[Title of District Court and Cause.]

TRANSCRIPT

Of proceedings in the above entitled cause, before the Hon. Delbert E. Metzger, Judge presiding, and a jury; the United States appearing by Willson C. Moore, Assistant United States Attorney; the defendant being personally present and represented

by his attorney Joseph V. Esposito, Esq., commencing at 9:00 a. m. on Tuesday, September 12, 1939.

(Clerk calls the roll, and the jury panel is duly qualified)

The Court: Is counsel ready?

Mr. Esposito: Ready.

Mr. Moore: Ready for the United States; and at this time, may it please the Court, we'd ask permission to enter a nolle prosequi as to Counts one and two, they not being exempt preparations but taxable narcotics, but they are alleged in the indictment as exempt preparations and not [236] narcotics; they cover the tincture of opium and analgesic No. 1.

The Court: May I see the indictment, please.

(Clerk hands file to the Court)

The Court: There are ten counts in the indictment.

Mr. Moore: Yes, Your Honor.

The Court: On One and Two you move for a nolle prosequi?

Mr. Moore: Yes, Your Honor.

The Court: The motion is granted.

(Clerk draws consecutively twelve names from jury box, the twelve jurors whose names were so drawn are seated, and all prospective jurors in courtroom are duly sworn)

Mr. Moore: May it please the Court, and gentlemen of the jury, I'll give you just a brief outline of

what this case is about so that the questions put to you on your examination of whether or not you are fit to sit in this case will come after you know something about what is to be tried.

The indictment in this case now is in eight counts: it charges this Dr. Young with being a registered physician and as such entitled to dispense preparations and remedies which contain a limited amount of narcotic drugs, but with the requirement that he shall keep records of all dispensations, sales and gifts of those drugs, and the various counts of this indictment allege that he has dispensed various amounts of these various exempt preparations without having kept those records.

Now does Your Honor—on some occasions the Court has asked questions on voirdire, that has been the usual practice of late, and then any further questions that are necessary [237] counsel has asked; or do you want counsel to ask the questions on voirdire?

The Court: Counsel may examine the jurors to their satisfaction.

(After questions and challenges by respective counsel, the trial jury is selected and duly sworn)

Mr. Moore: Gentlemen of the jury, the indictment in this case reads as follows: |

(Mr. Moore reads the indictment)

Now, gentlemen, we'll put on evidence to show you that during this period of time this defendant

has, as set out in the eight counts of the indictment that I've just read to you, purchased various amounts of these different what are commonly known as exempt preparations, preparations that have a limited amount of narcotics, in distinction from the narcotic drug itself. For instance, we'll say that opium is a narcotic, cocaine is a narcotic, heroin is a narcotic; but where drugs have something else in them—they may have alcohol, but they have a limited amount of narcotics; and each of these that I have named in the indictment are exempt preparations containing a limited quantity of narcotics. We'll show you that he purchased various amounts of these from the various dealers here in Honolulu, and that the law provides that he shall keep records of every bit that he sells, gives away, or disposes of at all; we'll show that, according to his records, in some cases he has kept records of part of it and in other cases he's kept no records at all of some of the preparations that are alleged in this indictment, the whole question here being whether or not he kept records as provided by the law with reference to these exempt [238] preparations; and upon showing you that we'll ask for a verdict of guilty at your hands.

Do you want to reserve your opening statement, Mr. Esposito?

Mr. Esposito: Yes, if the Court please, may we at this time reserve our opening statement until after the prosecution has rested.

The Court: Yes.

Mr. Moore: I suggest at this time—which would probably save considerable time of this court and jury—that we have a short recess of this court and jury.

The Court: Very well; take a recess until called.

(Recess—9:50 to 9:59 a. m.)

Mr. Moore: May it please the Court, it is stipulated by and between the parties to this action, through their respective counsel—I'll take these by order of the counts, Your Honor—that as to Count 3, that if a proper person were brought to testify in this court from the wholesale drug firm of McKesson-Langley-Michaels he would produce records and testify that they sold to Dr. Young, the defendant in this case, on the following dates the following amounts of paregoric:

November 7, 1938	1 gallon	
December 7, 1938	1	"
December 23, 1938	1	"
January 17, 1939	1	"
February 27, 1939	1	"
March 8, 1939	1	"
April 10, 1939	1	"
April 27, 1939	1	" [239]
May 25, 1939	1 gallon	
July 7, 1939	1 gallon	

making a total in all from November 7, 1938, of ten gallons of paregoric. Is that right?

Mr. Esposito: Correct.

Mr. Moore: Now, with reference to Hospital Purveyors, Ltd., that if a man—the same proposition as a person coming here to testify—I'll just give the dates and amounts, though; that is, the same proposition applies to Hospital Purveyors, Ltd., as it does to McKesson-Langley-Michaels:

July 25, 1938	1 gallon
Sept. 24, 1938	1 "
Oct. 1, 1938	1 "
Oct. 28, 1938	4 pints
Nov. 4, 1938	3 pints
Nov. 12, 1938	1 gallon
Nov. 14, 1938	1 "
December 3, 1938	1 "
January 26, 1939	1 "
Feb. 9, 1939	1 "
Feb. 21, 1939	1 "
March 7, 1939	1 "
March 13, 1939	1 "
March 27, 1939	1 "
April 7, 1939	1 "
May 1, 1939	1 "
May 15, 1939	1 "

making a total of purchases of paregoric from the Hospital Purveyors, Ltd., during this period, of 15 gallons and seven pints.

Under the same situation, the man from Davies & Co., [240] if produced, would testify that as to paregoric the following sales were made to this defendant:

October 7, 1938	1 gallon
January 20, 1939	1 "
March 16, 1939	5 "
April 19, 1939	2 "
May 4, 1939	2 "
June 8, 1939	1 "
June 29, 1939	1 "
July 20, 1939	1 "

making a total of 14 gallons of paregoric purchased from Davies & Co.

Now with reference to Stewarts' Fort Street Pharmacy, the following purchases by this defendant of paregoric:

October 23, 1938	1 gallon
November 1, 1938	1 "
November 22, 1938	1 "
November 28, 1938	1 "
January 31, 1939	1 "
March 27, 1939	1 "
June 26, 1939	1 "
July 12, 1939	1 "

making a total purchased from Stewarts' Fort Street Pharmacy of eight gallons of paregoric.

From American Factors, Ltd.:

March 3, 1938	1 gallon
November 26, 1938	1 "
December 13, 1938	1 "
May 17, 1939	2 " [241]
June 22, 1939	1 gallon

June 20, 1939	1 gallon
July 8, 1939	2 "

making a total purchased from American Factors of nine gallons in all.

With reference to S. E. Massengill & Co., San Francisco:

November 8, 1938	6 gallons
May 2, 1939	6 "
June 13, 1939	2 "
July 10, 1939	3 "

Making a total of 17 gallons.

And with reference to Upjohn & Co., San Francisco:

July 17, 1939	3 gallons
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that three gallons being the total purchased from Upjohn & Co.

Now, with reference to Count Four, which has to do with Linetus Compound; this is with reference to purchases from Davies & Co.:

September 1, 1938	1 gallon
September 23, 1938	1 "
October 7, 1938	1 "
October 24, 1938	1 "
October 1, 1938	1 "
November 12, 1938	1 "
November 17, 1938	5 "
February 16, 1939	5 "

June 8, 1939	1 gallon
June 15, 1939	1 "
July 20, 1939	1 "

making a total of 19 gallons of Linetus Compound purchased [242] from Davies & Co., Ltd.

Now, with reference to Count Five, American Factors, Ltd., that Dr. Peter Young purchased from American Factors, Ltd., Codeine Phosphate:

December 30, 1938	1 gallon
January 12, 1939	1 "
June 22, 1939	1 "
June 29, 1939	1 "
July 8, 1939	2 "

making six gallons in all.

Now, with reference to Count Six; this is with reference to purchases of the defendant of Sedatole from Theo. H. Davies & Co., Ltd.:

January 4, 1939	1 gallon
May 4, 1939	2 "
June 15, 1939	1 "
June 15, 1939	2 "

there were two purchases on the same date:

June 29, 1939	1 gallon/
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making a total of seven gallons in all.

With reference to Count Seven, this is the Honolulu Medical Supply Co., at 844 Fort Street, with reference to purchases of Camosalide Tablets:

500 tablets purchased on January 16, 1939

500 " " " May 15, 1939

The Court: What size tablets?

Mr. Moore: Well, each of these contained a quarter grain of Dover's Powder, these tablets containing $1/40$ grain of powdered opium.

Count Eight, with reference to Stokes Expectorant No. 6, as to American Factors; I've got a total of nine gallons, but I haven't the dates; do you have the dates? [243]

(Mr. Moore obtains data from a representative of said firm)

This is with reference to sales of Stokes Expectorant No. 6 by American Factors, Ltd., to the defendant:

March 25, 1938 , 1 gallon

February 16, 1938 " 1 "

The Court: 1938, or 1939?

Mr. Moore: 1938, Your Honor.

The Court: Well, does your count cover it that way?

Mr. Moore: Well, these are all in one count; that nine gallons accounted for in Count 8 of Stokes Expectorant; this is just the detail of the dates that each gallon was purchased to make up the nine gallons, Your Honor.

The Court: Oh yes.

Mr. Moore: (continuing) :

October 10, 1938	1 gallon
October 26, 1937	1 "
November 25, 1938	1 "
January 11, 1938	1 "
March 14, 1938	1 "
May 8, 1939	1 "
July 11, 1939	1 "

making a total of nine gallons from American Factors.

Now, with reference to Count Nine, this is Hospital Purveyors, Ltd., with reference to Ucillana Compound, sales to Dr. Young:

June 21, 1939	1 gallon
July 17, 1939	1 "

a total of two gallons.

Count Ten, with reference to Stewarts Fort Street Pharmacy, with reference to Expectorant No. 6; sold to Dr. Young: [244]

January 31, 1939	1 gallon
June 13, 1939	1 "
June 26, 1939	1 "
July 12, 1939	1 "

making a total of four gallons from Stewarts Fort Street Pharmacy.

It is further stipulated, may it please the Court, that if these various drug men were called their druggists would testify with reference to these va-

rious counts as to the narcotic content in each one of these preparations, so that I may just go through each count to get that particular thing.

With reference to paregoric, that it is commonly known as Camphorated Tincture of Opium, and it contains approximately 1.82 grains of opium to the fluid ounce.

With reference to Count Four, that Linctus Compound contains approximately one-half grain of Codeine Phosphate per fluid ounce.

That Codeine Phosphate as set forth in Count Five contains approximately one grain of codeine to the fluid ounce.

That as to Count Six, that Cedatole contains one-half grain of codeine sulphate to the fluid ounce.

That as to Count Seven, Camsalide Tablets—these are one-quarter grain tablets, each tablet containing approximately one-fortieth of a grain of powdered opium to the tablet.

With reference to Count Eight, Stokes Expectorant, that it contains approximately $9/32$ of a grain of opium to the fluid ounce.

That Ucellana Compound, as set forth in Count nine, [245] contains approximately one-quarter grain of ethylmorphine hydrochloride per fluid ounce.

As to Count Ten, that Expectorant No. 6 contains one-quarter grain of ethylmorphine per fluid ounce.

Mr. Esposito: Your Honor, as to this stipulation we agree that the amounts are as the prosecution

has announced, but we want either a stipulation by the prosecutor or these witnesses that every one of these preparations mentioned are recognized drugs, medicines and medical preparations, recognized by the official United States Pharmacopeia and used by druggists and doctors in the practice of medicine.

Mr. Moore: As I understand it, Mr. Esposito, these are what they call "exempt preparations"; they are used by various doctors, drug stores, and so forth, and we'll stipulate that they are legitimate for the purpose of sale; the only question involved here is the recording, that's all.

Mr. Esposito: Well, Your Honor, I'm not satisfied with that stipulation, unless he says that they are exempt preparations, recognized by the Act as medicines. He said "Sedatole"; that's a cough mixture; he hasn't given the full name; take many of these, for instance, Codeine Phosphate is a cough syrup; he called it "Codeine Phosphate"; of course we won't stipulate to that. Eight of these ten counts, Your Honor, are cough syrups and bear that name; for instance, Linctus Compound—a cough syrup; Codeine Phosphate—a cough syrup; Sedatole—a cough syrup; the allegation just says "Sedatole" or just "Codeine Phosphate"; as to that we will not stipulate unless he will stipulate the full name of these drugs, that they are medical drugs.

Mr. Moore: We'll stipulate that they are medical drugs. [246]

Mr. Esposito: Well, then we have no objections to the stipulation, that they are medical drugs and preparations.

Mr. Moore: Yes.

The Court: There's some little discrepancy between the quantities set out in the several counts and the stipulation as to the volume of purchases; in some cases—in most cases you have accounted by purchases for more quantity than—

Mr. Moore: I'll have to put on Mr. Barthelmess, who went through the records, Your Honor, and made the accounting, and what is left set forth in the indictment is the difference between what was purchased and what's accounted for.

The Court: Oh yes, all right.

Mr. Moore: Are you ready for this witness?

Mr. Esposito: Yes.

Mr. Moore: Mr. Barthelmess, will you take the stand, please.

FRED C. BARTHELMESS

being first duly sworn as a witness for the Plaintiff, testified as follows:

Direct Examination

By Willson C. Moore, Esq.

Q. Your name, please.

A. Fred C. Barthelmess.

Q. Your business?

A. Federal Narcotic Agent.

Q. And how long have you been in an investigative position with the Federal Government?

(Testimony of Fred C. Barthelmess.)

A. I have been connected with the Federal Government since May 24, 1916.

Q. And how long have you been a narcotic agent? A. Since March 3, 1934. [247]

Q. As a part of your duties do you have to check up with doctors and pharmacists, and so forth?

A. Yes; all registrants.

Q. Is Dr. Young a registrant under the narcotic laws? A. Yes sir, he is.

Q. Holding a license?

A. Yes; number 1109.

Q. And you know him as a member of what profession? A. Medical profession.

Q. During the month of July of this year did you make an investigation concerning Dr. Young?

A. I did, yes sir.

Q. And how did you happen to start to make that investigation, Mr. Barthelmess?

A. The investigation of Dr. Young really started around, I believe it was, the middle of January, 1939, at which time I was checking over some prescriptions at the Stewarts Pharmacy located on Fort Street just below Beretania Street, and I found at that time a prescription calling for a narcotic to a person whom we knew to be an addict,—

Mr. Esposito: We object, Your Honor; this is irrelevant and immaterial; we move that the answer be stricken out.

Mr. Moore: I have no objections.

(Testimony of Fred C. Barthelmess.)

The Court: Strike the answer.

Mr. Esposito: And, Your Honor, may we move to caution the jury to erase from their minds that evidence; I didn't expect it.

The Court: The jury will understand that when the Court orders any particular evidence or part of any evidence stricken you will disregard that in your further consideration of the case. [248]

Mr. Moore: Mr. Barthelmess, the evidence that I want to elicit from you I want to be confined to the exempt preparations for which this case is now on trial.

Q. During the month of July did you learn or ascertain anything about any of these exempt preparations that caused you to make any investigation?

A. Yes sir. Mr. Stevenson had been checking some of the records at the various wholesale drug houses in Honolulu here.

Mr. Esposito: We object, Your Honor, that it's irrelevant, immaterial, hearsay; what Mr. Stevenson said is not the best evidence.

Mr. Moore: Did you check the records?

A. Yes. As a result of his checks I was authorized by letter to make a check of the wholesale houses.

Q. You were authorized from where?

A. By Mr. Stevenson, my Supervisor.

Q. Very well. And did you make a check?

(Testimony of Fred C. Barthelmess.)

A. I did, yes sir.

Q. And other than making a check of the wholesale houses did you make any investigation with reference to any of these preparations dispensed by this Doctor to anyone else?

A. Yes, sir, I did; in company with Agents Mu and Wells, as to two addicts we received information from one addict—

Mr. Esposito: We object, if Your Honor please, and move that that be stricken and that the witness be cautioned not to enthrust addicts.

The Court: The last part of the answer is stricken. The answer was proper up until the time objection was made.

Mr. Moore: Did you find any of these exempt preparations on anyone? Just "Yes" or "No".

[249]

A. Yes; on May 18, 1939, a Korean by the name of Kim Buck Chil, at room 18-a at 1327 Liliha Street; and then on July 20th Mr. Stevenson, Agents Wells, Mu, and myself found on Ho Poon—

Q. What did you find on Ho Poon?

A. Ho Poon had a four ounce bottle of paregoric and fortified with Expectorant No. 6; he also had at that time a two ounce bottle containing about half an ounce of the same preparation, which he stated that he had—

Q. Never mind what he stated. After finding that did you see Dr. Young about this?

(Testimony of Fred C. Barthelmiss.)

A. Yes, immediately on July 20th after finding Ho Poon in the possession of these exempt preparations we went to the Doctor's office located at Vineyard and College Walk.

Q. Did you have a conversation with the Doctor with reference to them?

A. Regarding these two bottles?

Q. Yes. A. Yes, we had.

Q. And did you make any statement as to where they had come from?

A. Yes; at first we asked Dr. Young if he had during the day issued any exempt preparations to a Chinese calling at his place; he stated at that time he had not. However, when we confronted him with two bottles of exempt preparations we had taken away from Ho Poon he admitted then that he had given it to Ho Poon and told us what the preparation was.

Q. Stating that the preparation was what?

A. Was paregoric and Expectorant No. 6.

Q. Both of these contained narcotic drugs?

A. Yes, they do. [250]

Q. And they are what are commonly known as "exempt preparations"?

A. Exempt narcotic preparations.

Q. You've heard the stipulation we made here this morning with reference to various amounts purchased from different drug houses here?

A. Yes sir.

(Testimony of Fred C. Barthelmess.)

Q. And you're familiar with those dates and amounts that were purchased by Dr. Young?

A. Yes, I am.

Q. And that was a part of your investigation?

A. Yes sir.

Q. During the course of your investigation did you receive from the Doctor or request from the Doctor any of his records with reference to this?

A. I did, yes sir; at that time, on the 20th of July, I asked the Doctor for his record book for exempt preparations; he at that time took out of his cabinet a dispensing record for taxable narcotics and stated that he had not kept any record of his exempt preparations, that he didn't think it was necessary to do so.

Q. Now, Mr. Barthelmess, take with reference to Count Three, with reference to Paregoric; how much did you find the Doctor to have on hand at the time you made the inspection of Paregoric?

A. On hand he had two gallons and three pints; that was on July 20, 1939.

Q. And your checkup revealed, did it not, that there had been a purchase of 72 gallons and 4 pints?

A. Yes sir, both locally here and on the Mainland. [251]

Q. And that leaving an unaccounted shortage of how much?

A. I have 54 gallons and 4 pints, and then there's 18 gallons to be added to that shortage.

Q. Which would make 72 gallons and 4 pints?

(Testimony of Fred C. Barthelmess.)

A. Yes sir; 72 gallons and 4 pints short.

Q. And there was no record at all in the Doctor's office that was accessible for your inspection covering this 72 gallons and 4 pints?

A. No sir.

Q. And you are an agent of the Treasury Department and one of the persons whose duty it is to make such an inspection?

A. Yes sir; the Narcotic Bureau is under the jurisdiction of the Treasury Department.

Q. With reference to the fourth count, for this Linctus Compound, there has been testimony here by way of a stipulation that the Doctor purchased 19 gallons of Linctus Compound from Davies & Co. here in Honolulu; did you make a check of the Doctor's office to ascertain whether or not he had any of that compound on hand?

A. I did, yes sir.

Q. And how much did you find on hand?

A. On July 20th of this year he had two gallons and six pints on hand.

Q. Leaving a shortage that was not covered by records, of how much?

A. Of 16 gallons and 2 pints.

Q. And he kept no record whatsoever as to this?

A. No sir.

Mr. Esposito: What was that amount, please?

Mr. Moore: Sixteen gallons and two pints.

(Testimony of Fred C. Barthelmess.)

Q. Now, with reference to Codeine Phosphate—or, I think it's Syrup of Codeine Phosphate—

A. That's correct.

Q. It's been testified that there were six gallons purchased from American Factors; now I understand—did you make any check there, Mr. Barthelmess?

A. I did, yes sir.

Q. And did you find the Doctor to have any of that on hand?

A. Yes sir; on July 20th, the date of inspection, he had three gallons and three quarts.

Q. Leaving an unaccounted shortage—

A. An unaccounted shortage of two gallons and one quart.

Q. And did he have any records whatsoever as to this?

A. He had no dispensing record at all, of any of the shortage.

Q. Now, with reference to Count Six, which has to do with Sedatole, there has been testified here that the Doctor purchased from Theo. H. Davies & Co., Ltd., the sum of seven gallons. Did you find any on hand at the time you made this inspection at the Doctor's office?

A. Yes, I did; on July 20th, the date of the inspection, he had one gallon and three quarts, on hand.

Q. And what was the shortage on that?

A. An unaccounted shortage of five gallons, no quarts, and 28 ounces.

(Testimony of Fred C. Barthelmess.)

Q. And did he have any record accessible to your inspection covering this shortage?

A. Yes, he had a record which was kept in his taxable narcotic dispensing record, of four ounces.

Q. That was all that was accounted for?

A. That's all, yes sir. [253]

Q. Then that leaves in that particular—

A. Five gallons, no quarts, 28 ounces of an unaccounted for shortage.

Q. Then, of the difference between what he purchased and what he had on hand there was only four ounces accounted for in his narcotic record?

A. That is correct.

Q. Now, with reference to Camsalide tablets, has been testified to here by the Honolulu Medical Supply Co. that they sold to Dr. Young 1,000 of these quarter-grain tablets. Did you check his supplies to ascertain whether or not he had any on hand?

A. I did, yes sir, on July 20th, and on that date he had 129 on hand.

Q. And that makes a shortage of how much?

A. 871.

Mr. Moore: You notice that in the indictment against Mr. Esposito, there is alleged 1,371, which is 500 in addition to this—

A. I can clarify that if I'll be permitted.

Mr. Moore. I wish you would.

A. At the time that I checked the records at the Honolulu Medical Supply Co. the person filling the

(Testimony of Fred C. Barthelmess.)

order for Dr. Young had inadvertently put an "M" in the column calling for the amount of tablets dispensed to Dr. Young; "M" stands for a thousand.

Q. That's in Roman numerals?

A. Yes sir; therefore I figured that a thousand; however, I learned this morning from Mr. _____ that in checking his records to bring them to court he had found the original sales slip which called for 500; he seemed to be of the [254] opinion that a thousand was ordered and entered in the dispensing record, that is, his dispensing record before the actual delivery of 500 was made, and at the time the 500 was delivered the record was not changed to show that only 500 had been delivered.

Q. So that the unaccounted for shortage of which there is no record at all is 871 instead of 1,371?

A. 871, that is correct.

Q. With reference to Count 8, with reference to Stokes Expectorant No. 6, it has been testified to here that the American Factors sold to this Doctor nine gallons of this drug.

A. That's correct.

Q. Did you check his supplies to ascertain whether or not he had any of that on hand at the time you made your inspection?

A. Yes, I did, on July 20th, and at that time he had half a gallon of Stokes Expectorant on hand.

Q. Leaving an unaccounted for shortage of how much?

(Testimony of Fred C. Barthelmess.)

A. Eight and one half gallons; no record had been kept of the dispensings.

Q. Now, with reference to Count 9; it has been testified to through stipulation that the Hospital Purveyors sold to this defendant the amount of two gallons of Ucillana Compound; in your original report there was three gallons, and now I understand it's two; can you explain that?

A. Yes; there were two gallons purchased from the Hospital Purveyors; at the time I checked the records of the Doctor at his office he stated to me that one gallon of the preparation had been given him, and I took his word for it [255] and added to my report that gallon, which made a total of three gallons that he should have accounted for even though one gallon had been a gift to him.

Q. Well then, so far as actual records of sales to the Doctor are concerned, instead of being a shortage of two gallons and eight ounces as set forth here in the indictment, you've figured on the basis of purchases that should be one gallon and not two?

A. That is correct, on the basis of purchases.

Q. And was there any record kept as to this?

A. There was no record kept, no sir.

Q. Now, with reference to Count 10, that is Expectoant No. 6; it's been testified that Stewarts Pharmacy sold this man the sum of four gallons of this compound. Now, I understand that in investigating purchases from him he informed you as to

(Testimony of Fred C. Barthelmess.)

purchasing some additional amount on the Mainland? A. That is correct.

Q. And that amount is—

A. It amounted to, with what he had purchased locally and on the Mainland, ten gallons.

Q. In other words, there was four gallons, according to him, that he had purchased on the Mainland? A. Yes sir.

Q. And that's Expectorant No. 6?

A. No. 6.

Q. So, in comparing his figures on that, on the basis of ten gallons, there was a shortage of three gallons and one quart and 28 ounces?

A. That is correct.

Q. And there was some unaccounted for, was there, [256] Mr. Barthelmess, or is that just what he had on hand?

A. There was on hand six gallons, two quarts, and four ounces; he had not kept a record of any of the dispensings.

Q. This investigation and all that you've testified to, with the exception of purchases on the Mainland, took place here in Honolulu, City and County of Honolulu, Territory of Hawaii?

A. Yes sir, it did.

Q. And within the jurisdiction of this Court?

A. Yes sir.

Q. You are familiar with the regulations; are you not, with reference to the keeping of records?

A. Yes sir.

(Testimony of Fred C. Barthelmess.)

Q. And what should a doctor or druggist or any person having a license of this kind—how should they keep these records?

Mr. Esposito: There's nothing in the law how they should be kept; it's personal opinion.

Mr. Moore: We've got the regulations right here.

Mr. Esposito: That's a question of law for His Honor to decide and not this witness; we object, Your Honor.

Mr. Moore: Are these the Treasury regulations issued to your office?

A. Yes; this is regulation number five, relating to the importation, manufacture, production, compounding, sale, dealing, dispensing, or giving away of any narcotics.

Mr. Esposito: Your Honor, we object; it's a question of law for the Court to decide and not for the jury and not for this witness; that is the main crux of this case, whether or not the law requires that a doctor should keep [257] a record, and surely this witness is not going to usurp the function of the court on questions of law and usurp the function of the jury on questions of fact.

Mr. Moore: We offer Treasury regulation 185 with reference records required, referred to on page 79 of these regulations, in evidence.

Mr. Esposito: As far as that is offered we have no objection for the Court, but we do object to that

(Testimony of Fred C. Barthelmess.)

being exhibited for the jury because the rules, regulations, statute, and so forth—

Mr. Moore: It's made pursuant to the statute.

Mr. Esposito: Very well; Your Honor is going to decide on that, but we object to anything of that going to the jury because the Court decides on the law, and we object to those regulations.

The Court: Received as United States Exhibit 1.

Mr. Esposito: Will Your Honor rule on my objection: I have objected to that exhibit going into the record; I take it Your Honor admits it.

The Court: The objection was overruled by the receiving of the exhibit in evidence.

Mr. Esposito: And Your Honor will allow me an exception for the reasons stated, to the Court's ruling.

Mr. Moore: You may cross examine.

Cross Examination

By J. V. Esposito, Esq.:

Q. Mr. Barthelmess, you say that Dr. Young, the defendant, is a licensed physician and surgeon in the Territory? A. He is, yes sir.

Q. And he has paid his tax according to the internal [258] revenue law for the dispensing and giving away—

Mr. Moore: I'll admit he's duly registered as alleged in the indictment and has paid his special tax and is permitted to dispense these exempt narcotics upon keeping the proper records.

(Testimony of Fred C. Barthelmess.)

Mr. Esposito: We object to that stipulation, Your Honor, and we move that it be stricken about "proper records". Your Honor, that's the whole crux of this case, and when the prosecutor entrusts that feature it's unfair to the defendant.

The Court: It's merely an opinion; go ahead and make your examination.

Mr. Esposito: Your Honor, I move that the prosecutor's stipulation be stricken from the record.

The Court: It isn't anything that is agreed to; it isn't put in as testimony at all; it's simply an offer of a stipulation; it's rejected.

Mr. Esposito: Very well, Your Honor. May I make a motion that Your Honor caution the jury to erase from their memory the statement made by the prosecutor as to "proper records" in his offer of stipulation, that any prejudice formed in their minds be erased.

The Court: The motion is denied as not being necessary.

Mr. Esposito: Will Your Honor allow me an exception.

The Court: Exception allowed.

Mr. Esposito: Now, Mr. Barthelmess, I asked you the question has Dr. Young paid his tax according to law and the requirements of the internal revenue act.

Mr. Moore: If you know.

Mr. Esposito: How is that?

(Testimony of Fred C. Barthelmess.)

Mr. Moore: I object to it unless you find out whether he [259] knows or not; he doesn't work in the Internal Revenue.

Mr. Esposito: Do you know whether he's paid his tax?

A. I don't know whether he's paid all his taxes or not; I know he had a special tax stamp.

Q. You investigated Dr. Young on narcotics, didn't you? A. Yes.

Q. Didn't you look for his tax record to see if the tax was paid? 5

A. He had the tax stamp; I said he had a tax stamp but I didn't know whether he had paid all his taxes that the Internal Revenue is charged with collecting.

Q. What tax does a doctor have to pay to practice medicine and prescribe and dispense narcotics, if you know?

A. He pays a special tax to the Collector of Internal Revenue of \$1.00.

Q. And do you know whether he paid that dollar of taxes?

A. Evidently he had; he had a special tax stamp issued to him.

Q. Why "evidently"? Don't you know it's a fact that he had a receipt that he paid his tax?

A. I didn't see him pay it; I saw the tax stamp.

Q. And it's part of your duty to investigate if that's an official receipt, as a narcotics investigator?

(Testimony of Fred C. Barthelmess.)

Mr. Moore: It isn't a receipt, it's a tax stamp, Mr. Esposito.

Mr. Esposito: A tax stamp; and as part of your duty did you examine that stamp to see if it was official and okey? A. I did.

Q. And was it? A. It was.

Q. And in your investigation have you found out and do you know that he was practicing medicine when he dispensed [260] all these drugs charged in the indictment?

A. Well, I don't know whether he was legitimately practicing medicine or not; he has an office located at Vineyard and College Walk.

Q. Didn't you investigate and ask the Doctor what he did with all these drugs?

A. I asked him what he did with them; he said he prescribed them to his patients.

Q. Yes; did you check up on that?

A. No, I did not.

Q. But the Doctor told you he prescribed them to his patients? A. That's correct.

Q. Now as to these counts, Mr. Barthelmess; you say you checked up on the items of the different drug counts? A. That's correct.

Q. Now, taking Count 3, Paregoric; do you know any other name for Paregoric?

A. Yes; Tincture of Opium Camphoride.

Q. Do you know what that is, whether it's a medicine or a drug used by doctors?

(Testimony of Fred C. Barthelmess.)

A. Yes, it's a medicine prescribed by doctors for legitimate patients; it can be also prescribed for patients that aren't legitimate medicinal cases.

Q. And how do you know that?

A. Well, since I've been with the Narcotics Bureau I know that it's used by addicts when they can't procure their normal supply of regular narcotics; it will satisfy their craving for the narcotic.

Q. Did you in any case in your investigation find that Dr. Young, the defendant, prescribed Paregoric exclusively [261] without a combination with another cough syrup?

A. No, I don't believe I did, where he gave Paregoric without another exempt preparation being put in to fortify the Paregoric, or the Paregoric being added to the exempt preparation to fortify that preparation, in other words making the narcotic content a lot stronger after the two had been mixed together than it would have been had it been dispensed individually.

Q. That's your opinion?

A. That's my opinion, yes.

Q. And it may be all wrong, Mr. Barthelmess, your opinion?

A. I wouldn't say that it is, no, because you can't take one and one and add them together and make it less.

Q. Yes, but are you a druggist or a chemist, Mr. Barthelmess?

A. No sir, I'm not.

Q. What do you know about Paregoric.

(Testimony of Fred C. Barthelmess.)

A. I don't know anything about Paregoric or any of the medicinal uses of it; however, I do know that it's used by addicts.

Q. You don't even know what Paregoric is, do you?

A. Well, I know what it is, but I don't know what it's composed of.

Q. Yes, you know what it is, and I ask you what does Paregoric contain?

A. It can contain not more than two ounces of powdered opium.

Q. What else does it contain?

A. I don't know.

Q. You don't know?

A. Offhand; I have seen—

Q. Do you know that it contains camphor?

A. Yes, it does. [262]

Q. Do you know that it contains 45% of alcohol?

A. It contains alcohol; I didn't know the percentages.

Q. And you know it's used in medicine by doctors for colic and coughs, don't you?

A. Yes, in small doses.

Q. What doses?

A. Well, for infants, children, they prescribe doses of a few drops to a dose, probably five to a dose.

Q. What would they give to an adult, a man, of Paregoric?

(Testimony of Fred C. Barthelmess.)

A. Well, legitimately I wouldn't know.

Q. So when you say that the cough medicine fortifies it and makes Paregoric stronger you're talking through your hat, aren't you.

Mr. Moore: Just a minute; I object to that as argumentative, Your Honor.

The Court: It's argumentative.

Mr. Esposito: What's the Court's ruling?

The Court: The objection is sustained to the argumentative statement.

Mr. Esposito: Now take, Mr. Barthelmess, this patient that had the mixture of Paregoric in the cough expectorant syrup, as I think you said,—

A. Expectorant No. 6, that's correct.

Q. What's the content of Expectorant No. 6—withdraw the question. What's the real name of this Expectorant No. 6? Do you know?

A. I do not know, no sir.

Q. In your investigation of all these drug houses you checked this drug of so many gallons entered?

A. No sir. [263]

Q. Well, let's see if I can refresh your recollection; is it known as Stokes Expectorant Cough Syrup?

A. Not that I know of; Expectorant No. 6 and Stokes Mixture are two different brands of medicine.

Q. They are two different brands; what's the other name for Expectorant No. 6?

(Testimony of Fred C. Barthelmess.)

A. I couldn't tell you; all I know it by is Expectorant No. 6.

Q. And isn't it called Stokes Expectorant Cough Syrup?

A. I believe they issue it for cough syrup; I don't know—

Q. The name on the bottle, the official name of the company that makes it?

A. I couldn't say offhand; it may have it on there; I won't say it does.

Q. And do you know how much narcotic it contains, or how much narcotic?

A. Yes, it contains ethylmorphine a quarter grain to the fluid ounce.

Q. And Paregoric contains what?

A. It contains not more than two grains of powdered opium to the ounce.

Q. And you still say that Expectorant No. 6 is a stronger narcotic than Paregoric?

A. I don't believe—

Mr. Moore: I object to ~~that~~; he didn't say it was stronger than Paregoric.

Mr. Esposito: He says it "fortifies" it, if your Honor please, that's his answer; I want to know what he means by "fortify"; fortify what?

A. I can explain that if you'll let me. [264]

Q. Yes.

A. When I say "fortify" I'm acting on the advice of your client. At the time I inspected his record I asked him why he mixed these two different

(Testimony of Fred C. Barthelmess.)

things together; he said it was to fortify the other; if that's incorrect it's his mistake.

Q. Did'nt he say it was to dilute it?

A. No sir.

Q. Didn't he say that this Expectorant No. 6 contained Ephedra, Syrup Squill, Syrup Ipecac, potassium Guaicul Sulfonate, ethylmorphine Hydrochloride, Syrup Tolu and Menthol, and when he mixed it with Paregoric that he destroyed the effect of the Paregoric?

A. Absolutely not, no sir; he said he was fortifying one with the other.

Q. Did he say to you that he gave this mixture because the patient had a coughing bronchitis?

A. He didn't say bronchitis.

Q. What did he say?

A. He said he was giving it for coughs and stomach pains.

Q. In each of these counts, on your direct examination, Mr. Barthelmess, you used the words "No dispensing record", is that correct?

A. That's correct.

Q. What do you mean by "no dispensing record"?

A. He did not keep the required record of exempt preparations as given away or administered by him.

Q. And where did you get this "required record"?

(Testimony of Fred C. Barthelness.)

A. From the Harrison Narcotic Act and regulations as laid down under regulation 5, section 18 page 79 of regulation 5. [265]

Q. Made by whom, these regulations?

A. I believe that they were made by the Treasury officials; whether it's the Secretary of the Treasury or the Commissioner of Narcotics I'm not certain.

Q. Isn't it made by the Commissioner of Internal Revenue subject to the approval of the Secretary of the Treasury?

A. It may be, yes sir.

Mr. Esposito: Your Honor, I move that his answer be stricken; it's a question of law, and the gentleman is giving his opinion on questions of law.

Mr. Moore: I object to striking the answer.

The Court: The motion is overruled.

Mr. Moore: It's responsive to his question.

The Court: Yes.

Mr. Esposito: Will Your Honor allow me an exception for the reason stated, to the Court's ruling?

The Court: Yes.

Mr. Esposito: But that is where you get your conclusion of "required record", from these authorities you mentioned?

A. Yes, they are the regulations which guide our work.

Q. Did you ask him if he had any vouchers for the purchase of these drugs mentioned in the eighth

(Testimony of Fred C. Barthelmess.)

counts? A. No sir, I did not.

Q. And you are acquainted with the regulations of your Internal Revenue Commissioner?

A. That is correct.

Q. Do you know Article 179; it's called "Article", in regulation No. 5, U. S. Treasury Department, Bureau of Narcotics; are you acquainted with Article 179? (showing pamphlet to the witness).

[266]

A. Yes; this contains more or less the stock preparations that are made by the registrant for use in his office; in other words, if he removes some of his stock from the supply in his office to his laboratory and there in his laboratory makes up some kind of a solution or compound, he then does not have to keep a record of each dispensation of it; however, he must have some record to show that on such and such a date he did take from his ordinary narcotics stock for office use or laboratory use.

Q. That's your opinion, what you just testified?

A. That is, yes; it's more or less how I would interpret the regulation.

Q. Well, you read the regulation, and not your personal interpretation; I want the regulation; read it.

The Court: You haven't asked the witness to explain the meaning of it?

Mr. Esposito: I just asked him if he's acquainted with the regulation, Your Honor, and he's put his interpretation.

(Testimony of Fred C. Barthelmess.)

Mr. Moore: Well, if he's got any record let him put that in evidence if he wants to.

Mr. Esposito: Are you acquainted with that regulation 179; "Yes", or "No"? A. Yes.

Q. Read it.

A. (Reading): "A practitioner who, in his office practice, administers minute quantities of narcotics in stock preparations, may keep, as to such preparations, in lieu of the record required by Art. 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted." [267]

Q. Did you talk to the defendant Dr. Young about this rule you just read? A. Yes, I did.

Q. What did he say to you?

A. He said that he did not take any of his exempt preparations and use them in any compound or preparation, exempt formula, and so forth. However, he had used taxable narcotics that way.

Q. Isn't it a fact that he never used any of these medicines and drugs charged in the eight counts, alone, but he always mixed them with another?

A. I wouldn't say positively that he did that, no sir.

Q. Did he say to you that he did?

A. No, he did not say that he always mixed them.

Q. He did not say so? A. No sir.

(Testimony of Fred C. Barthelmess.)

Q. Did he ever tell you that he ever gave any of these drugs mentioned in the eight counts that he did not mix with another drug when he dispensed it to his patients?

A. On the particular ones he was questioned about he did state that he generally mixed it with something else; however, "generally" I didn't interpret as being "positively".

Q. But of every one of these eight counts of the drugs charged there, Mr. Barthelmess, if I understood you correctly on your direct examination, you told the prosecutor Mr. Moore that he had stock on hand of each one, is that correct?

A. I believe that he had stock on hand of each one.

Q. Didn't you so testify?

A. Well, I'd have to look back through here (indicating document) to see; maybe of one or two items he didn't have any on hand. [268]

Q. Well, if you'll check up. Count 3, Linctus Compound Cough Syrup; is Count 3 for a fluid or a solid?

A. Beg pardon?

Q. Is Linctus Compound Cough Syrup a fluid medicine or a solid medicine?

Mr. Moore: Well, that's not in Count 3; it's Count 4. Paregoric is Count 4.

Mr. Esposito: Count 4.

A. It's called Linctus Compound; it's a fluid.

Q. Is Paregoric a fluid?

A. It is, yes sir.

(Testimony of Fred C. Barthelmess.)

Q. Did he have any on hand when you examined and checked up in his office?

Mr. Moore: What are you talking about now?

Mr. Esposito: Paregoric; starting with Count 3.

A. Yes, he had two gallons and three pints.

Q. On hand? A. On hand.

Q. Did he have any as a stock to give to patients; what did he have it on hand for, if you know?

A. I don't know.

Q. Did he tell you?

A. He said he used it in dispensing it to his patients.

Q. Would you call that a stock on hand?

A. I called it stock on hand; I've listed it as such in my inventory.

Q. Now we go to the next one, Linctus Compound Cough Syrup; did you find any on hand when you made your check-up in July?

A. Yes sir; he had two gallons, six pints.

Q. Two gallons, six pints?

A. That's correct. [269]

Q. Now we'll go to Count 5; that I believe is Codeine Phosphate Cough Syrup; is that a liquid or a solid? A. It's a liquid.

Q. Are you acquainted with whether it has "Cough Syrup" on the bottle of Codeine Phosphate?

A. I believe it's called Syrup of Codeine Phosphate, or something like that, or Codeine Phosphate Syrup.

(Testimony of Fred C. Barthelmess.)

Q. How much, if any, did he have on hand on your examination?

A. He had three gallons and three quarts.

Q. Now we'll go to the next count, please. Sedatole Cough Syrup, is that a liquid, or a solid?

A. That's a liquid.

Q. Do you recall if it had the name "cough syrup" attached to "Sedatole" in any of your checks?

A. I don't recall whether it has "cough syrup" on it or not; it may have it.

Q. But you're satisfied it's a liquid?

A. Yes, I am.

Q. Did he have any of that on hand when you checked him?

A. Yes; he had one gallon, three quarts.

Q. Now going on to the next count; that would be seven, Camsalide Cold Tablets, is that the full name?

A. Camsalide Tablets is the name on the bottle, as I recall it.

Q. Nothing said of "Cold Tablets"?

A. I don't recall anything on there of that; it may be.

Q. About how big are these tablets?

A. I think they are a five-grain tablet.

Q. About that size?

A. Oh, about the size of an aspirin tablet.

Q. Do you know what they're used for, of your own knowledge, these Camsalide tablets? [270]

(Testimony of Fred C. Barthelmess.)

A. I understand that they're used for colds, yes.

Q. Do you know that they contain sodium salicylate, potassium iodide, Dover's powder, camphor, and tincture of gelsemium?

A. No, I do not know that they have all that, but they may have it.

Q. Do you know that they're used for influenza, chronic bronchitis, sciatica, rheumatism,——

A. There's probably any number of things that they can be used for in the legitimate practice of medicine.

Q. Did he have any of those on hand, doctor?

A. I beg your pardon, I'm not a doctor.

Q. Oh, I beg your pardon, Mr. Barthelmess,——

The Court: We'll take a recess for five minutes at this time.

(Recess—11:05 to 11:13 a. m.)

Mr. Esposito: May we proceed, Your Honor.

The Court: Yes. The jury are all in the box.

Mr. Esposito: Talking of these Camsalide Cold Tablets, doctor——

Mr. Moore: Doctor?

Mr. Esposito: I beg your pardon, Mr. Barthelmess; you say they are about five grains, about as big as an aspirin tablet?

A. I think so, yes.

Q. When you checked in the doctor's office did he have any of those tablets on hand?

A. He had 129 on hand.

(Testimony of Fred C. Barthelmess.)

Q. And did he say anything about that he kept those in stock for distributing and dispensing to his patients? A. No, he did not.

Q. Did you ask him anything about these tablets? [271]

A. I asked him about his shortage on them, yes sir.

Q. The next count, I believe, is eight; Stokes Expectorant; are the words "cough syrup" or "syrup" on that?

A. It may appear on the bottle; I'm not certain.

Q. Do you know whether it's a liquid, a fluid or a solid? A. It's a liquid.

Q. And did you check up on his office stock whether or not he had any of Stokes Expectorant Cough Syrup on hand?

A. Yes; he had on hand the date I made the inspection on July 20th a half gallon.

Q. Did you have any talk about this drug Stokes Expectorant Cough Syrup as to what he prescribed it for or how?

A. Concerning his shortage only.

Q. The next count, I believe, is nine; Ueillana Cough Syrup—how do you pronounce that?

A. Ueillana; it was formerly Cocillana.

Q. Is that syrup a liquid—a fluid or a solid?

A. It's a liquid.

Q. Does it say anything about a "cough" on that? A. It may.

(Testimony of Fred C. Barthelmess.)

Q. And did you check the doctor on whether or not he had any stock on hand in his office of that drug?

A. Only concerning his shortages.

Q. And did you find any on hand when you checked up?

A. Yes sir.

Q. How much?

A. On hand at that time he had seven pints eight ounces, or seven pints and a half.

Q. And the last count, ten, Expectorant No. 6, cough syrup?

A. That's Expectorant No. 6; I understand it's used for coughs. [272]

Q. Is that a liquid, or a solid?

A. It's liquid.

Q. And did you check the doctor as to whether or not he had any of this Expectorant Syrup on hand, No. 6?

A. Yes; at that time he had on hand six gallons, two quarts, and four ounces.

Q. So that, by your testimony, of the entire eight drugs in question he had some on hand?

A. Yes sir.

Q. As I understand you, Mr. Barthelmess, in your direct examination, the defendant Dr. Young told you in one of your conversations that he didn't keep a dispensing record because he didn't have to, or words to that effect?

A. No, I didn't, that he didn't have to.

Q. Not that he said he didn't have to?

A. No.

(Testimony of Fred C. Barthelmess.)

Q. Why did he say why he didn't keep a dispensing record?

A. He said he didn't keep a record of any of his exempt preparations because he didn't think it was necessary to keep them; however, at that time I reminded him that I had called on him sometime earlier in the year, after January 21st, and had admonished him regarding the keeping of proper records, and one thing and another, and he assured me at that time that he was familiar with the regulations and was abiding thereby.

Q. And it was his opinion that according to the regulations he did not have to keep a dispensing record of exempt drugs?

A. He didn't say that it was his opinion that according to the regulations; he said he didn't think it was necessary [273] for him to keep records of exempt preparations.

Q. And you checked on his dispensations of other drugs that are not exempt, morphine straight and codeine and these other narcotics?

A. Yes sir.

Q. Did he have a proper record for that?

A. No sir.

Q. He did not have a proper record for that?

A. No sir.

Q. Did you report it to Mr. Moore?

A. He had a record but it wasn't a proper record, and I reported it to Mr. Moore, yes sir.

(Testimony of Fred C. Barthelmess.)

Q. He's not charged on the regular narcotics, is he?

A. Mr. Moore could probably explain that better than I can; originally he was charged.

Q. Do you know of your own knowledge if he's been charged?

A. Originally he was charged, yes.

Q. When do you mean, "originally he was charged"?

A. When the indictment was drawn up he was charged under Counts One and Two.

Q. And those are the two counts that Mr. Moore struck this morning under nolle pros.?

A. That is correct.

Mr. Moore: And I stated, Mr. Esposito, that I had erroneously, not being a doctor or a physician, charged them as being exempt drugs, and stated the reason that I had nolle prossed them because I had since learned that they are taxable narcotics, not exempt remedies.

Mr. Esposito: So they had been stricken, so far as you know, and nolle prossed by the prosecutor this morning?

A. That is correct. [274]

Q. And that is Count One and Count Two of this indictment?

A. That is correct.

Q. And did you check up on his books as to morphine sulphate straight that the doctors use?

A. I did.

Q. Did he have proper records for that?

A. No sir.

(Testimony of Fred C. Barthelmess.)

Q. What was missing in his dispensing record?

A. Well, on his last 100 purchase, which was made on July 7th, I think, or the 8th, he had purchased 100 quarter-grain morphine sulphate tablets, H. T., that's hypq tablets; on the date of inspection, that was July 20th, some eight days after the purchase of this 100, he had on hand at that time 53 one-quarter grain tablets out of the original 100 purchased; his dispensing book showed rather than six quarter-grain tablets having been dispensed, three half-grain tablets had been dispensed; that at that time took care of only 57 tablets, I believe; anyhow, the shortage for that eight-day period was 41 one-quarter grain morphine sulphate tablets.

Q. Did you talk to him about that, Mr. Barthelmess?

A. I did, yes sir.

Q. What did he say as to that?

A. He stated to me at that time that he had contacted an itch around his privates and also in having relations with his wife at home that he had given this itch to Mrs. Young; that he had taken on three occasions 10 quarter-grain morphine sulphate tablets and mixed them in an ointment which he and she both used, and that he had entered those in the book; however, in checking over his total narcotics [275] dispensed, that is, quarter-grain morphine tablets, and having in mind the 41 tablets short of the last 100 purchased, he had entered in his book dispensation of 505 one-quarter grain tablets. When

(Testimony of Fred C. Barthelmess.)

this was explained to the Doctor, he said that he couldn't account for that, as each time that he had administered or used a tablet in any way he had made the record at that time.

Q. Anything else you recall?

The Court: Counsel, the Court gets the impression quite forcibly that we're going into some matters that are not in issue here, matters that were not touched upon in the direct examination, and to my mind it is simply not only wasting time but it might tend to confuse the issues that are before the Court and jury.

Mr. Esposito: I agree with Your Honor, but, Your Honor, we have a witness that volunteered these answers—

Mr. Moore: Oh no; I object to that, may it please the Court; he asked for it himself.

Mr. Esposito: Well, Your Honor, now that the evidence is in there, if Your Honor wants to make that ruling, we'll either strike it out or I may be permitted to ask one further question to connect it with this indictment; that is my reason for the cross examination.

The Court: I think properly it should be stricken out, but if you want to ask one more question—

Mr. Esposito: Yes, Your Honor.

The Court: In order to connect it up with what has come in, you may do so.

Mr. Esposito: Mr. Barthelmess, didn't he tell you, in explaining that he didn't keep the record

(Testimony of Fred C. Barthelmess.)

of those [276] drugs that were short, that it was because he was in personal attendance on patients and according to law he didn't have to make a record? A. He did not, no sir.

Q. He never used the words "personal attendance on patients"? A. No sir.

Q. You and he never had a talk like that?

A. We had a talk, but he made no such statement to me.

Q. On personal attendance?

A. No sir, he made no such statement to me.

Mr. Moore: What are you referring to; did you talk about morphine, or about some other things?

A. About morphine and these drugs, each one of those; at no time in any of my conversations with Dr. Young do I recall him having made any statement regarding this being in personal attendance on a patient.

#Mr. Esposito: You know that's an exception to the law, regarding personal attendance?

#A. No sir, it's not.

Mr. Moore: I object to your asking this witness something that's got nothing to do with this particular proposition here. The law that you're speaking of, as counsel well knows, has reference to Section 1044 and not 1041.

Mr. Esposito: Your Honor, as I know the law and as I intend to prove to this Court and jury that has reference to every drug under this Act.

The Court: All right; now let's proceed.

(Testimony of Fred C. Barthelmess.)

Mr. Esposito: Read the question, please, Mr. Reporter.

(Reporter reads last question and answer, marked #)

Q. Are you acquainted with Sec. 2-A of the narcotic act? A. Yes sir, I am. [277]

Q. What does that say?

A. It exempts a registrant, a physician, from keeping a record of drugs personally administered by him to a patient when he is in personal attendance at a bedside.

Q. Does it say anything in this section about the "bedside", Mr. Barthelmess?

A. No sir, it doesn't.

Q. Then why did you enthrust "at a bedside"?

A. Because that is the ruling that has been handed down by the courts.

Q. Did you know the ruling of 280 Federal, that that was overruled and held unconstitutional, Mr. Agent; from your position in the Internal Revenue Department did you learn that?

A. No sir, I did not.

Q. Then you volunteered that word "bedside" of your own accord; it's your opinion, is that right?

A. Well, it's more or less my own opinion.

Q. Now read section two to the jury; out loud, please; Sec. 2-A, I mean.

Mr. Moore: Just a minute, Mr. Barthelmess, until I find this Sec. 2-A to see what it's all about here. (after a pause): I object, may it please the

(Testimony of Fred C. Barthelmess.)

Court. This is the provision under Sec. 1044, and not under Sec. 1041; this has to do with the dispensing of drugs distributed to a person when on actual attendance, and this is not the section that has to do with exempt narcotic drugs, which is 1041. This charge, may it please the Court, is under Sec. 1041, and there is no exception in that at all. Section 1044 has to do with taxable drugs and in contradistinction of exempt [278] preparations. On taxable drugs there is an exemption where it's on actual attendance, that's such as morphine, heroin, cocaine, and things of that kind, where the doctor actually administers and attends the patient himself, but there is no such provision in 1044; so, may it please the Court, the question is incompetent, irrelevant, and immaterial, and has no bearing on the issues in this case, and he's not charged under the law where he seeks to add this exception.

Mr. Esposito: If Your Honor please, may I be heard on this point?

The Court: Yes.

Mr. Esposito: The prosecutor is mistaken; exempt drugs are taxable; anything that has opium or its derivatives is taxable, and he's mistaken when he interprets the law that way. Section One gives how much the United States Government taxes—one cent for an ounce or a fraction thereof; exempt drugs are taxable; and his other conclusion and interpretation that 1044, as he calls it, that is, Sec. 2

(Testimony of Fred C. Barthelmess.)

that I'm talking about, does appertain in the practice of the profession concerning any drug covered by this Act. If Your Honor please, on that theory and statement we claim the question is relevant and material.

The Court: The objection is sustained as to the reading of the Section.

Mr. Esposito: Your Honor will allow me an exception for the reasons stated.

The Court: Yes.

Mr. Esposito: And now I move, Your Honor, that there may be stricken from the record the answer of this witness where he entrusts the word "bedside", as irrelevant, [279] immaterial, and not in the narcotic laws, and it may confuse and prejudice this jury since Your Honor has sustained the objection and stopped me from inquiring.

The Court: The motion is denied. You examined him as to what he meant by that, and he made his explanation; that's all before the jury.

Mr. Esposito: Your Honor, I may say that it's a voluntary statement; he's already admitted it's not on the statute; I asked him if he's acquainted with Section 2-A and he said "Yes" and he next puts in the word "bedside".

The Court: The witness admits that it was his personal opinion, based, as he said, upon some court decision relating to the matter, so let us pass that.

(Testimony of Fred C. Barthelness.)

Mr. Esposito: Then, as I understand it, Your Honor has refused my motion to strike?

The Court: I did.

Mr. Esposito: Your Honor will allow me an exception for the reasons stated, to the Court's ruling.

The Court: You have had your exception.

Mr. Esposito: Did you ask the Doctor in any talk or checkup or examination of this case, the defendant, about the vouchers for all these drugs, the receipts, of when he purchased these drugs charged in the eight counts?

A. No sir, I did not.

Q. Then you do not know if he has vouchers for all the drugs he purchased?

A. For the purchases of them I don't know.

Q. You don't know; and you didn't question him on that?

A. No, I did not;—you're referring, Mr. Esposito, just to the exempt preparations, I presume?

[280]

Q. Oh yes, just to the exempt preparations.

A. Yes.

Q. Charged in these eight counts of our indictment?

A. Yes.

Q. This Article 179, do you know whether that's a rule or regulation of the narcotics authorities, to-wit, the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury?

(Testimony of Fred C. Barthelmess.)

A. This is the regulation five issued by them, yes sir.

Mr. Moore: Here it says here, "Joint Narcotic Regulations made by the Commissioner of Narcotics and the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury".

Mr. Esposito: I knew it, Mr. Moore, but I wanted to know if he knew it.

Q. You knew that? A. I did.

Q. And on this stock—this Article 179 that you read to the jury, on stock preparations, I'll read it again to refresh your recollection; you may check me, Mr. Moore: (reading): "Article 179: Stock Preparations: A practitioner who, in his office practice, administers minute quantities of narcotics in stock preparations, may keep, as to such preparations, in lieu of the record required by Art. 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted."

Q. Did you ask him about this?

A. That section there you've just referred to applies to taxable narcotics.

Mr. Esposito: I move the answer be stricken as non-responsive. [281] I asked him did he inquire of him about this section, Your Honor.

Mr. Moore: (Argument).

The Court: Read the question, Mr. Reporter.

(Reporter reads last question and answer)

(Testimony of Fred C. Barthelmess.)

Mr. Esposito: I put the question to this witness, a learned witness and a specialist in this subject, if the Court please, a special agent since 1916, "Did you ask the Doctor about this?" And what is his answer? He squirmed and evaded and volunteered this evidence.

Mr. Moore: May it please the Court, I object to that and ask that Mr. Esposito be admonished that such tactics as that are wholly uncalled for and improper.

Mr. Esposito: Your Honor, I still claim that answer is irresponsive to the question, and move it be stricken, and that's before the Court.

The Court: The question and the answer last put and given are stricken from the evidence.

Mr. Esposito: And Your Honor will allow me an exception to the Court's ruling.

The Court: You may have your exception. Now proceed with your cross examination of this witness, counsel, and confine yourself a little closer to the matter of his examination on the direct; you have been too far afield here and it isn't helpful to the case from either angle.

Mr. Esposito: Your Honor, I object to the Court's comment and move that the Court caution the jury to erase the Court's personal remarks on this case as prejudicial to the interests of this defendant.

The Court: The motion is denied. Proceed with your cross examination. [282]

(Testimony of Fred C. Barthelmess.)

Mr. Esposito: Will your Honor allow me an exception to the Court's ruling for the reason stated.

Q. So, as I understand your testimony in regard to what you testified, Mr. Barthelmess, that he had no dispensing record of these drugs charged in the eight counts of the indictment?

A. No, I don't believe that I testified that he didn't have any record; for a few of the items listed in the indictment here he did have a partial record which was not kept as an exempt preparation but in his taxable narcotics dispensing book.

Q. Now, I asked you in regard to the exempt drugs that are alleged in these eight counts; did you use the answer or expression "no dispensing record"?

A. To some of the items, yes.

Q. And did he have a dispensing record on the other items?

A. Yes, partially so.

Q. And you didn't inquire as to a stock record or a record of stock?

A. I asked him for his dispensing record, that's all.

#Q. Now I'm asking you, did you ask him as to his record of stock drugs dispensed by him?

A. I don't quite get the meaning of your question there, Mr. Esposito.

Q. Well, I think it's plain English. Will you read it again, please, Mr. Reporter.

A. Well, it may be; I don't know.

Q. Well, I think it's good English.

(Reporter reads foregoing question, marked #)

(Testimony of Fred C. Barthelmess.)

Mr. Moore: May it please the Court, here they're talking [283] about a stock record; now, I don't know of any record that you call a "stock record".

Mr. Esposito: "Stock drug record", the question is.

A. I don't know of any that refers to stock or drug here.

Q. Did you ask him that? I'm not asking if you know.

A. No sir, I did not ask him that, I'm not required to on an investigation of that nature.

Mr. Esposito: No further questions.

The Court: Witness, if you'll confine yourself to answering the questions and stop there, we'll get ahead faster.

Redirect Examination

By Willson C. Moore, Esq.:

Q. Mr. Barthelmess, you testified that Dr. Young told you he "fortified" this thing?

A. That is correct.

Q. Now, after Dr. Young was checked up was he requested to make any explanation of this?

A. He was, yes sir.

Q. Did he write a letter to Mr. Stevenson on that? A. He did.

Q. I'll show you a letter here and ask you if you've ever seen it before?

A. Yes, this is the letter which Dr. Young wrote to Mr. Stevenson on July 24, 1939.

(Testimony of Fred C. Barthelmess.)

(Mr. Moore shows document to Mr. Esposito)

Mr. Esposito: No objection.

Mr. Moore: I'll offer this in evidence, may it please the Court.

Mr. Esposito: No objection, Your Honor.

The Court: It will be received in evidence.

(Marked "U. S. Exhibit No. 2) [284]

Mr. Moore: This is a letter on the stationery of Dr. Young, addressed to C. T. Stevenson, Post Office Box 3285, Honolulu, T. H. (Mr. Moore reads Exhibit No. 2)

U. S. EXHIBIT No. 2

Office Phone 4202

Res. Phone 65981-2044

Ex. (b)

P. L. Young, M. D.

L.R.C.P., M.R.C.S., England

Cor. College Walk and Vineyard Street

Honolulu, Hawaii

July 24, 1939

Received Jul. 25, 1939. Bureau of Narcotics,
District 16, Honolulu, Hawaii.

Mr. C. T. Stevenson,

P.O. Box 3285,

Honolulu, T. H.

Dear Sir,

As requested by phone—

1) Why do I use so much Paregoric?

I use Paregoric to mix cough syrups,
corrective, parepeptol and English

(Testimony of Fred C. Barthelmess.)

Stomach Powder, especially compounded for me by Lam's Pharmacy.

2) Why do I use Paregoric?

I get better results by fortifying the above preparations with Paregoric.

3) Why no label on that bottle?

Because that patient told me that it was unnecessary as he understood the directions I gave him in Chinese & that he couldn't read English anyway.

Yours truly,

(Signed) Dr. P. L. YOUNG

[32]

(Envelope attached to U. S. Exhibit No. 2)

(Post Mark) (Stamp)

After 5 Days Return to

P. L. Young, M.D.

Cor. College Walk and

Vineyard St.

Honolulu, Hawaii.

Mr. C. T. Stevenson

P.O. Box 3285

City

Received Jul. 25, 1939. Bureau of Narcotics,
District 16, Honolulu, Hawaii

[Endorsed]: Crim. 9224, U. S. Exhibit No.
2, Admitted in Evidence 9-12-39. [33]

(Testimony of Fred C. Barthelmess.)

Q. When you saw him—you say you saw him in January—was there any conversation with reference to exempt preparations records at that time?

A. Yes; it was around the latter part of January; I had occasion to go to Dr. Young's office.

Mr. Esposito: I object, Your Honor; anything in January is not in this indictment, it's irrelevant and immaterial.

Mr. Moore: In his cross examination he asked this witness if the witness had not talked to this defendant at any time, and he testified as to it being in January; now I'm permitted, I believe, to go into that particular phase, he bringing it up.

The Court: I think the witness made a full statement as to what had transpired before, did he not?

Mr. Moore: I don't believe—it was with reference to keeping a record, but it was not specifically testifying as to whether this contained the taxable narcotics or exempt preparations, and I wanted to clear up that particular is all, Your Honor.

Mr. Esposito: Your Honor, then we object.

The Court: The objection is sustained.

Mr. Moore: Very well. That's all.

Recross Examination

By J. V. Esposito, Esq.

Q. You testified, didn't you, Mr. Barthelmess, that he used Expectorant No. 6 to fortify Paregoric?

(Testimony of Fred C. Barthelmess.)

A. No; used to fortify one with the other. [285]

Q. Now I'm asking you what you testified this morning.

A. I said that he fortified Paregoric with No. 6 or No. 6 with Paregoric; I believe that was my testimony.

Q. Is that what you said this morning?

A. Yes.

Q. Well, it would take too much time to look it up; we all have an independent memory. Now I'm asking you did you say that the Doctor told you that Expectorant No. 6 was used to fortify Paregoric?

Mr. Moore: I object to that, may it please the Court; his testimony is all in the record; why he should ask him and ask him and ask him—we'll never get through.

Mr. Esposito: There's an inconsistent statement with this letter.

Mr. Moore: The witness didn't write that letter.

Mr. Esposito: Why did you offer it?

Mr. Moore: I offered it for the purpose—because you said in your cross examination something that instead of fortifying it they were making "skim milk" out of it, diluting it.

Mr. Esposito: Yes, that's just what's in the letter here.

The Court: Counsel will refrain from arguing with each other.

(Testimony of Fred C. Barthelness.)

Mr. Esposito: Mr. Reporter, will you read the question that he's objecting to, to refresh our recollection.

The Court: You went into that and exhausted it on cross examination. It doesn't enter into cross examination. The objection is sustained.

Mr. Esposito: Now I'm asking you to look at this exhibit, U. S. Exhibit No. 2; read number two there, what it says. [286]

A. (Reading): "2. Why do I use Paregoric?"

Q. Examine the answer.

A. (Reading): "I get better results by fortifying the above preparations with Paregoric."

Q. Yes. So here he says in the letter that he used Paregoric to fortify the other drugs, and not the other drugs to fortify Paregoric; is that your understanding?

A. That's what the letter says.

Q. What did he tell you outside of the letter?

Mr. Moore: Oh, may it please the Court, he's already testified what he told him; the Court has already ruled on that; it's an attempt to avoid the ruling.

Mr. Esposito: If the Court please, now I'm cross examining his redirect; he's put in an exhibit here; the testimony as we claim it, Your Honor, is that this gentleman said that the Doctor told him he used the cough remedy to fortify Paregoric; the exhibit says the opposite, that he used Paregoric to fortify the other drugs; and I want to clarify that as a question of fact.

(Testimony of Fred C. Barthelness.)

The Court: There's nothing before the Court.

Mr. Moore: I objected to the question, Your Honor.

The Court: I thought that was ruled on; if not, the ruling is that it is sustained.

Mr. Esposito: Will Your Honor allow me an exception for the reasons stated.

The Court: Exception noted.

Mr. Esposito: Now, number one says this, reading from U. S. Exhibit No. 2, "As requested by phone, why do I use so much Paregoric? I use Paregoric to mix cough syrups, corrective, pareptol and English stomach powder, especially [287] compounded for me by Lam's Pharmacy."

Q. Did he tell you anything like this about him compounding his own drugs?

A. No sir; he said that he had some special English prescriptions which Lam's Pharmacy would on occasion compound for him.

Q. And ~~did you~~ consider those drugs that Lam's compounded for him to be stock preparations according to this answer? A. Yes.

Mr. Esposito: No further questions.

Mr. Moore: That's all; the case for the United States.

Mr. Esposito: Your Honor, at this time we move that this defendant be discharged and dismissed of

every and all counts alleged and charged in this indictment, for the following reasons: That each and every count and all the counts do not state sufficient allegations to charge any offense or crime against the United States Government or the Territory of Hawaii, or both;—

Mr. Moore: Well, we can't charge it against the Territory of Hawaii, because we're in the Federal Court.

Mr. Esposito: Any crime of any kind whatsoever. (Q) That the evidence introduced by the United States Government upon these eight counts alleged in this indictment after striking out Count One and Count Two of the indictment, that that evidence is insufficient to prove or corroborate any of the requirements charging a crime or a felony of the Harrison Anti-Narcotic Act or of the Act known as of 1914; that the indictment merely states and by its allegations infers that it is a crime for the Doctor, who is registered and licensed to be a physician and surgeon in the Territory [288] of Hawaii, has paid his narcotics tax stamp or stamp tax according to law, has fulfilled all the requirements, that while he is in the practice of his profession of medicine he has distributed the alleged exempt drugs and medicines to patients in the lawful practice of his profession of medicine, that there is no evidence that he has not in any one case personally attended to these patients; that the entire eight counts make it a crime, a felony, if Your Honor please, for a lawfully registered doctor and

surgeon to fail to keep a record of exempt drugs; that those eight counts of the indictment do not charge a felony or a crime according to the Harrison Anti-Narcotic Act; that it is a conclusion of the prosecutor that that is a crime, and that any interpretation, inference or construction that the prosecutor or his assistants and associates give to the Harrison Narcotic Act deducing and concluding from that deduction or interpretation that the allegation charged in the eight counts constitute a felony of the Harrison Narcotic Act is unconstitutional, to-wit, for the following reasons: That their interpretation and construction of this Harrison Narcotic Act as they allege and claim in these eight counts of the indictment give an authority not delegated to the Commissioner of Internal Revenue to make rules and regulations, called "articles", interpreting this Act against the United States laws, on the Constitution and its amendments; that Congress cannot delegate a power to the Internal Revenue Commissioner or the Commissioner of Narcotics or to the Secretary of the Treasury or to any of his agents and officers to regulate the practice of medicine and pharmacy requiring the interpretation and [289] inference of these eight counts as claimed by the prosecutor; that that is a police power of the State and the Territory to regulate the practice of medicine, whether or not a doctor should keep records; that it is further unconstitutional that reference to the alleged Act itself, Your

Honor, the Harrison Narcotic Act, by its inferences, that expressly asservate making it a crime for a doctor that has a license and has paid his tax, that honestly practices his profession, without recording the exempt drugs, that any interpretation or inference in interpreting the Act that makes such a crime is a power that the United States Congress has not, because it regulates the practice of medicine, infringes and violates upon the police powers of the State and is therefore unconstitutional; and for the last reason, Your Honor, that any inference or interpretation of these eight counts of the indictment concluding that they are a violation of the Harrison Narcotic Act, by that interpretation, where the Act is silent or omits to make a crime the failure to record exempt drugs, that any such inference would also render the Act unconstitutional if the Court were to rule such interpretation legal. We claim, Your Honor, that the Act as we interpret it is constitutional and has been interpreted by the Federal courts, but by the interpretation given to this Act by the eight counts that that interpretation, inference or deduction is unconstitutional. And, Your Honor, in concluding the motion I further request that the jury be dismissed or excused temporarily; and whenever Your Honor decides, I have authorities that will take me from one to two hours to cite to Your Honor in support of this motion for a directed verdict and I'd like to be heard on the law. [290]

Mr. Moore: Mr. Esposito, can you give us any estimate as to how long your defense will take in the event that your motion you made is overruled?

Mr. Esposito: There will be no defense. Your Honor; we rest on our motion. There will be no defense in the sense of evidence.

Mr. Moore: Very well, then I have no objection to spending the entire afternoon with Mr. Esposito arguing this matter now; and if there is no evidence on the part of the defense I'd suggest that instead of convening here tomorrow morning at nine o'clock with this jury that we convene here at ten; the reason I suggest that is that Mr. Stainback will be here in the morning and I would very much appreciate getting things straightened out with him; there are a lot of urgent things pending; it will give me an hour or so to go out to the boat, and I'll have an opportunity to take important matters up with him.

The Court: You can have the jury at 11 o'clock if you prefer.

Mr. Moore: Well, I might say also, Mr. Esposito, after this argument is concluded, if your motion is denied then we can take up the matter of instructions.

Mr. Esposito: Yes.

Mr. Moore: So that, at 10 o'clock tomorrow morning we can go to the jury.

Mr. Esposito: Well, will you have enough time? It will take us at least an hour to go over the instructions.

Mr. Moore: Well, it's a long time from now until midnight.

Mr. Esposito: Well, if you're satisfied to do it this afternoon. [291]

The Court: What time do you want the jury tomorrow?

Mr. Moore: I suggest 10 o'clock. What's the consensus of opinion of the jury; does that meet with you gentlemen's approval?

Jury: Yes.

The Court: What time do you want the Court to convene this afternoon to hear your argument?

Mr. Moore: I suggest 1:30; then we can get going here.

The Court: The jury, then, is recessed until tomorrow morning at 10 o'clock; and in the meantime keep your own counsel and do not hear anything concerning this case except what you hear in the courtroom here from the witness stand and from the Court or counsel; don't discuss it with anyone or allow anyone to inject any opinion that they might have concerning it, whether it's an opinion or alleged fact concerning the matter. I take it that most of you gentlemen have been on the jury before, and in criminal cases, and you have been instructed and admonished as to what your rights and duties are in that matter. Ten o'clock tomorrow morning, gentlemen of the jury; and the Court is recessed until 1:30 this afternoon.

Mr. Moore: Shall we have the argument in your chambers this afternoon?

The Court: Yes.

(Adjourned—12:00 noon) [292]

In Chambers—1:30 p. m.

The Court: What I want to get is your points of law, with your authorities, and I hope you have your authorities so you can give me the excerpts.

Mr. Esposito: They are all here, yes, Your Honor. As we go along, if there are any which Your Honor thinks apply, if you'll ask for it we can get it, Your Honor.

The Court: All right. Then, the main point you are making is that the interpretation that the District Attorney's office here has put on this Narcotic Act is erroneous, that it is in the first place contrary to the true interpretation of the Act, and that if the interpretation they have put on it is a correct interpretation of the Act and of the regulations made pursuant to the Act, then the whole thing is unconstitutional for two reasons, one being that Congress can't delegate its authority to this officer or department to make regulations which themselves would be unconstitutional by reason of being an erroneous interpretation of the Act; that's about the substance of it, as I get it.

Mr. Esposito: Yes, that's the substance. I may add another reason, if I didn't mention it this morning in the motion, that if the interpretation

put on these regulations by the prosecutor representing the United States Government is held to be lawful, that so far as that interpretation concerns the defendant it is further erroneous because their interpretation is inconsistent with Sec. 2 of the Harrison Narcotic Act.

The Court: And what is Section 2?

Mr. Moore: 1044. [293]

Mr. Esposito: Yes, of the United States Code.

The Court: That 1041 is inconsistent with 1044?

Mr. Esposito: Well, I'm not sure whether it's 1041 or 1044, Your Honor.

The Court: Section 1041 pertains to drugs containing narcotics less than two grains to the ounce.

Mr. Esposito: Well, two grains with reference to opium, and one-quarter grain as to morphine, and one grain with reference to cocaine.

The Court: And Section 1044 pertains to simply narcotic drugs.

Mr. Esposito: Correct, Your Honor.

The Court: All right; now I think I get that.

Mr. Esposito: This case, as Your Honor already knows, involves a practicing physician and surgeon—

The Court: Yes.

Mr. Esposito: Your Honor also knows that I have been a licensed physician and surgeon for many years,—

The Court: So I have understood without looking at the record.

Mr. Esposito: And I practiced medicine under this section and all the law that's involved in this case here, and myself have lived with the same intent that this defendant had; so when he became my client I took a special added interest in this defendant because he's a brother doctor and because I labored when I practiced medicine under the same interpretation he has as to this Section 6, or 1041, and Section 2, as it's called, 1044 by the United States Code Annotated; so that, Your Honor, I spent the past month and, without any conceit on my part, I feel that I have read every Federal decision upon the points involved that are printed in the books that I can find in both libraries, [294] that is, the Federal Supplement, the Circuit Courts, and the United States Supreme Court. (Argument continued).

(Arguments by opposing counsel, and comments by the Court)

The Court: I am sufficiently satisfied now, Mr. Esposito, so that I deny your motion for a directed verdict. Now that that's over, it will necessitate instructions to the jury.

Mr. Esposito: Your Honor, may I take an exception to the Court's ruling on the motion?

Mr. Moore: You better take that, just for your own good, in front of the jury.

Mr. Esposito: Yes, but I want to take it here also.

The Court: What time can you be ready?

Mr. Moore: I think I can get here by possibly nine-thirty.

The Court: Well, shall we say nine-thirty, then?

Mr. Moore: And the jury be here at ten.

The Court: I can see that no doubt we may have to keep the jury some time, but that's all right.

(Adjourned—4:50 p. m.)

September 13, 1939

In Chambers—9:50 a. m.

(Mr. Esposito has just finished requesting re-opening of the case to put the defendant on the witness stand)

Mr. Moore: I have no objection.

The Court: It's within a defendant's rights to have his day on the stand. We will not decide on the future course until we see whether we go with the evidence and when the case has closed as to the evidence, and then we'll settle when we'll take up the instructions, and also we'll find out what will be the best time to call the jury again. [295]

Mr. Moore: All right, Judge. Well, the jury is due here at ten o'clock; that's about ten minutes.

Mr. Esposito: May I for the record's sake—

Mr. Moore: Well, you didn't close your case; you said yesterday you wouldn't put on any evidence; you didn't close.

Mr. Esposito: Yes, that's correct.

Mr. Moore: You see, you don't have to reopen.

Mr. Esposito: That's correct.

10:00 a. m.

(In open court, with the jury present)

Mr. Moore: Ready for the United States; stipulate the jury is present.

Mr. Esposito: Ready for the defense; so stipulated, that the jury is present.

The Court: All right; you may proceed. The motion for a directed verdict for the discharge of the defendant is overruled.

Mr. Esposito: And, Your Honor, may I be allowed an exception to the Court's ruling in overruling and denying my motion for a directed verdict, for the reasons mentioned in my motion here and also incorporated in the argument yesterday afternoon. May we proceed, Your Honor?

The Court: Yes.

PETER YOUNG

being first-duly sworn, testified as a witness in his own behalf, as follows:

Direct Examination

By Mr. J. V. Esposito, Esq.

Q. What is your name, please?

A. Peter Young. [296]

Q. And are you also known by another name of Young Lup? A. Yes, Young Lup.

(Testimony of Peter Young.)

Q. And are you the defendant in this action, Doctor? A. Yes, sir.

Q. Where do you live, Doctor?

A. 2157 Kanealii Street.

Q. What is your occupation?

A. Physician and surgeon.

Q. Are you registered to practice medicine in the Territory of Hawaii? A. Yes sir.

Q. How long have you been registered, Doctor?

A. Oh, about two years now.

Q. And where did you graduate, from what college of medicine?

A. From the University of London, University of Great Britain, and the Royal College of Physicians of London, and from the College of Surgeons of England.

Q. When did you graduate? A. 1936.

Q. How old are you, Doctor? A. 38.

Q. Are you married? A. Yes, sir.

Q. Any children?

A. A son, 13 years old.

Q. And are you an American citizen, Doctor?

A. Yes sir.

Q. By birth? A. By birth.

Q. Where were you born?

A. Honolulu.

Q. And are you living with your wife and child in Honolulu? A. Yes sir.

Q. Are you registered according to the Harrison Narcotic Act as a physician and surgeon?

(Testimony of Peter Young.)

A. Yes sir. [297]

Q. And for the year 1939 have you paid the regular tax that doctors pay to the Internal Revenue Commissioner? A. Yes, I did.

Q. Do you practice any specialty in the practice of medicine? A. No; general work.

Mr. Moore: A general practitioner?

A. General practitioner.

Mr. Esposito: You heard the evidence introduced yesterday concerning these different drugs alleged and charged in the different counts of this indictment that you purchased from the various drug stores?

A. In regard to the first count, Doctor,—

Mr. Moore: You mean Count Three?

Mr. Esposito: Count Three; the United States Government alleges in the first count that between the period of August 26th, 1937 and July 21st, 1939, in the City and County of Honolulu, you did distribute and dispense and give away 72 gallons and 4 pints of a preparation and remedy which did not contain more than two grains of opium in one fluid ounce, to-wit, Paregoric, and that you failed to keep a record of such distribution and dispensation. Now, in regard to that allegation, is that amount correct; did you distribute 72 gallons of Paregoric within that time? A. Yes sir.

Q. And is it also correct, as the indictment says, that you did not keep a written record as required by the Internal Revenue Commissioner?

(Testimony of Peter Young.)

A. Well, I knew, it wasn't necessary, so I didn't keep any record.

Q. You say you thought it was unnecessary?

A. Yes sir. [298]

Q. Upon what fact did you base that opinion of yours that it was unnecessary to keep a record?

A. Because I remember that a physician, while they state he shall keep a record of the name, address, and quantity of the drug dispensed, except such as may be dispensed to a patient upon whom they shall personally attend, dispense or administer; they tell me that regulation that you have to keep, but they never mentioned the exception to the rule.

Mr. Moore: May it please the Court, I ask that the answer be stricken; the ignorance of the law is no excuse.

Mr. Esposito: We don't claim "ignorance of the law"; the issue here is whether there is an exception; we're introducing this Doctor's opinion like he introduced Mr. Barthelmess' opinion.

The Court: All right; overruled.

A. Because they read part of it and they didn't even finish the sentence up to that personal attendance; just they only read part of a sentence.

Mr. Esposito: When you say "they" to whom do you refer, to what persons?

A. Narcotic agents.

Q. Do you know their names?

A. Well, Mr. Barthelmess was present there all the time.

(Testimony of Peter Young.)

Q. Do you recall any other agent you talked to?

A. Mr. Stevenson.

Q. Any other agent?

A. Well, that's about all in the matter.

Q. So then, by the word "they" you mean that you talked to Mr. Stevenson or to Mr. Barthelmess?

A. Yes sir. [299]

Q. Now, Doctor, continuing in regard to this Paregoric, this amount of 72 gallons; you say you did not keep a record as required by the Internal Revenue Commissioner because of this personal attendance exception? A. Yes sir.

Q. When you dispensed this drug do you know about how many patients you dispensed this amount of 72 gallons of Paregoric to?

A. Well, one in every ten patients—about one in ten.

Q. Well now, this period that you dispensed this amount of Paregoric, the indictment is from August 1937 to July 1939, that would be about how many months, Doctor? A. Well, 24 months.

Q. And is that approximately the time it took for you to dispense this amount of Paregoric?

A. Yes sir.

Q. So that, roughly speaking, 72 gallons dispensed in 24 months would be an average of about three gallons a month? A. Yes sir.

Q. That's not exact, it's an approximation, is that so? A. Yes sir.

(Testimony of Peter Young.)

Q. About how many patients, on an average, did you treat and administer this Paregoric within, say, the average month?

A. Well, I figure one out of every ten patients, and they have a refill once a week or so.

Q. How many patients do you see in a day or a month, Doctor?

A. Well, roughly, I should put 20 to 30 patients a day.

Q. And in a month that would be about 30 times 20 or 30? A. Yes. [300]

Mr. Moore: Does he hold office hours Sunday and everything?

Mr. Esposito: I withdraw that. Do you hold office hours on Sundays? A. Yes; two hours.

Q. This drug, do you dispense it at your office, at the home of the patient, or how do you dispense it? A. In my office.

Q. Do you ever dispense any at the home of the patient?

A. Yes sir. I have some in my bag, and when I diagnose the case I maybe give this medicine also.

Q. At home? A. Yes sir.

Q. What are your office hours?

A. 10 to 12; 2 to 4; 7 to 8 in the evening.

Q. Do you work on Sundays also?

A. 10 to 12.

Q. And you may call at homes every day at different hours? A. Oh yes.

(Testimony of Peter Young.)

Q. So, as I understand it, Doctor, approximately during this period of time you have seen on an average of about 600 to 900 patients a month?

A. Yes sir.

Q. And administered to these six to nine hundred patients about, roughly, three gallons of Paregoric?

A. Yes sir.

Q. Did you ever dispense or administer any of this Paregoric of these 72 gallons when you were not in personal attendance on the patient?

A. No, no; I always examine the patient, and I use this Paregoric and mix with cough syrup.

Q. What do you mean by "personal attendance; what do you do [301] in treating a patient in personal attendance?

A. Well, they come to my office, and I get the history, I then examine the patient and form a diagnosis and give them a bottle of cough syrup, say, four ounces, and direct them to take to to three tablespoonfulls, every two or three hours one tablespoonfull.

Q. What do you do in making an examination when you examine a patient?

A. Well, I naturally strip the part of their body involved and do a routine examination, inspection, watch the movement of the chest, for example, and palpitation, begin to feel the different parts, then percuss.—

Q. What is that—tamping the different parts of the chest, percussion?

(Testimony of Peter Young.)

A. Yes; then we test them with the stethoscope and see if any abnormal sounds in the chest; and that gives us a picture of the disease.

Q. That is your general examination?

A. Yes.

Q. And your testimony, as I understand it, is that for all the patients wherein you distributed and dispensed this 72 gallons of Paregoric over a period of approximately 24 months, that you always were in personal attendance by making these examinations you mentioned? A. Yes sir.

Q. Did you ever dispense any of this drug to any patient of yours where you were not in personal attendance? A. Never.

Q. Now Doctor, how would you dispense and give away this Paregoric?

A. Well, say I use 72 gallons, I use about 100 gallons of cough syrup, and I diagnose the case and see what sort [302] of abnormal signs, well, whether according to medical tests they are moist or dry sounds; then we add the 72 gallons of Paregoric to the cough syrup, and the cough syrup got several different ingredients, Expectorant, and stimulants like alcohol, and we figure the alcohol content of Paregoric at 75%, and camphor; so I compound that and got good results, and the patient's symptoms are relieved, and they could even sleep through the night.

Q. Now, if I understand you correctly, Doctor, that to approximately the 72 gallons of Paregoric

(Testimony of Peter Young.)

dispensed by you you mixed with about 100 gallons of cough syrup?

A. Yes, about 100 gallons.

Q. And the mixture would be approximately equal parts, or about half and half?

A. Approximately half and half, yes.

Q. Did you ever give Paregoric, dispense it, or distribute it to any patient wherein you gave it straight without mixing it with cough syrup?

A. Never straight.

Q. You're sure of that, Doctor?

A. I'm sure of that.

Q. This Paregoric, has it got any other ingredients outside of opium?

A. Oh, it has several other different ingredients, like benzoic acid, oil of anise, camphor, and alcohol 60% to make up to 1,000.

Q. Alcohol how much?

A. 60% alcohol in it.

Q. So that Paregoric is more than half alcohol, is that right, Doctor?

A. Oh yes. [303]

Q. It's 60%? A. Yes.

Q. And Paregoric is a fluid, a liquid composition? A. Fluid.

Q. These other drugs you mentioned, and particularly camphor, is camphor a drug used in medicine?

A. Yes; that's good for a heart stimulant.

(Testimony of Peter Young.)

Q. And it is a medicinal preparation—camphor?

A. Yes; so considered.

Q. So that when opium is combined with camphor you have a preparation in alcohol that has medicinal value outside of the paregoric?

A. Oh yes, it has.

Q. Roughly, what is the effect of camphor given to a human being?

A. Well, the camphor is a cardiac or heart stimulant, and the majority of doctors I know since I returned here recommend camphor rubbing on the chest, and I think it's best to administer it internally and I get better results that way; and when I began to accumulate my number of patients I began to buy other non-narcotic drugs practically \$500.00 a month; I buy from McKesson \$75.00; Davies about the same amount; American Factors—so I pay \$500.00 a month on drugs alone, and all exempt preparations only about a fraction less than a hundred dollars.

Q. So, if I understand you correctly, you averaged about \$500.00 a month purchase of drugs wholesale?

A. Cash, yes.

Q. Cash, a month?

A. Yes.

Q. And about what percent of this \$500.00 is paid for drugs that have a narcotic content? [304]

A. Well, I put it less than \$100.00.

Q. That would be about twenty or twenty-five percent of your total monthly bill?

(Testimony of Peter Young.)

A. About 15%.

Q. And this other four hundred dollars, or 85%, that you spend every month for drugs, what kind of drugs are those?

A. They got no narcotic in it; just straight.

Q. Give us an idea of some of the drugs you use.

A. Bismuth, bicarbonate of soda, and magnesium sulphate; and if a patient's case is a slight case then I just simply give the plain mixture, and if it calls for something to relieve the pain I may add a little Paregoric to it besides the cough syrup.

Q. But you dispense, as I understand you, about, say, \$400.00 worth a month of non-narcotic drugs to your patients?

A. Yes sir.

Q. That is approximate, Doctor?

A. Yes sir. I have a book there that tells you about the money I paid out there, the little red book there; I keep an itemized account of all the expenses paid out.

Q. Is this (indicating) the book you mean, Doctor?

A. Yes sir.

Q. Will you go through the pages and briefly tell us what that consists of?

A. Well, you see, I keep a record of all the dispensations here,—

Mr. Moore: May I see that book first?

(Mr. Esposito hands the book to counsel)

Mr. Esposito: Now, Doctor, adverting to this book, briefly [305]

(Testimony of Peter Young.)

A. I practiced two years; and the first year a young doctor doesn't make much; I made about \$127.00 cash the first month, and at the end of the first year \$1,000.00 cash; and at the end of the second year I began to make \$1,500.00 a month; as time goes on business gets better and better; and I buy from nine different drug stores; Honolulu Medical Supply, I paid them about \$17.75; Hospital Purveyors, \$50.00,—

Mr. Moore: I don't see any necessity of reading those things off; those contain a record of what he paid to these various people.

Mr. Esposito: Then we offer it.

Mr. Moore: This is the record, Doctor, this red book, named "Record"—what period does that cover, Doctor?

A. Well, from January 1st this year.

Q. Just from January of this year?

A. Yes; that gives you an idea of the business I have.

Q. You haven't got the books for the first year you started and last year, have you?

A. Well, I have some on slips, and then when business gets better and begins to take an interest I begin to get a book.

Mr. Esposito: And that represents there the period of this year how much drugs you purchased from all the druggists?—

A. Yes sir.

Q. And all those drugs were dispensed by you personally in your practice, is that correct?

(Testimony of Peter Young.)

A. Yes.

Mr. Esposito: We offer the book, Your Honor, for what it's worth.

Mr. Moore: I don't know what it's worth, that's what's [306] bothering me! there's no record there of keeping exempt drugs; it just gives Stewart's Pharmacy, so much; Davies, so much; it's got nothing to do with a narcotic record whatever.

The Court: Received in evidence as Defendant's Exhibit "A".

Mr. Esposito: Doctor, as the purchaser of drugs have you got any other documents of while you've been in practice, outside of this book?

A. There are all the vouchers here; shows the amounts of narcotics bought.

Q. For what period of time do those vouchers represent?

A. For the whole two years since I entered practice.

Q. From the beginning, the first day you went into practice until today? A. Yes sir.

Q. And those vouchers are receipts?

A. Yes sir.

Q. For what? A. For drugs I bought.

Q. For drugs you bought? A. Yes sir.

Q. Since you've been in the practice of medicine? A. Yes sir.

Q. So that we can identify them, what's this book here?

(Testimony of Peter Young.)

A. Well, it's the routine we keep, the drugs we bought and exhausted, all stock preparations.

Q. And for how long a period of time does this book cover for your stock preparations?

A. Same period as these here; two years.

Q. For the same period? A. Yes.

Q. How are these files listed—in the name of the drug stores you bought from?

A. Name of the drug stores and dates in order.

[307]

Q. And the papers inside that file would be the receipts or vouchers of all the drugs you bought?

A. Yes sir.

Q. Here you have Hospital Purveyors, Ltd.?

A. Yes sir.

Mr. Esposito: We offer this, Mr. Moore (showing to counsel).

Mr. Moore: The only objection that I have to these, may it please the Court, is that I don't see where their relevancy comes in; these are the purchases, that's just what's already in, that he has got these drugs. What we're after, what it seems to me is pertinent to this issue, is, were these the records of his dispensations.

Mr. Esposito: Your Honor, we claim it on this theory, that these vouchers show the good faith of this defendant.

The Court: What's before the Court now?

Mr. Esposito: I offered these vouchers of drugs bought from the day he's been in practice until to-

(Testimony of Peter Young.)

day, that's during this entire course, of all the drugs, including either the narcotic and non-narcotic, to show the evidence of good faith of this physician.

The Court: From one firm?

Mr. Esposito: All the firms.

Mr. Moore: This is the first one; as I see it, it's just cluttering up the record, may it please the Court; the charge in here is—

The Court: Overruled. Received in evidence as Defendant's Exhibit "B".

Mr. Esposito: Now Doctor, adverting to this other file that reads "Stewart's Pharmacy"—

A. Yes sir. [308]

Q. And does this file contain all the receipts on drugs you bought from Stewart's Pharmacy?

A. Yes sir.

Mr. Esposito: We offer the same.

The Court: Received. (Marked "Defendant's Exhibit C")

Mr. Esposito: This other file, Doctor, what is that? A. T. H. Davies.

Q. And the papers filed in this file, are they all the receipts and vouchers of the drugs you bought from the Company since you've been in practice?

A. Yes sir.

Mr. Esposito: We offer it.

The Court: Received. (Marked "Defendant's Exhibit D")

(Testimony of Peter Young.)

Mr. Esposito: Now, looking at that (indicating), Doctor, what is that?

A. Honolulu Medical Supply.

Mr. Moore: Is that what they commonly call the "Blackboard" down here?

A. Yes, it's a new firm; they changed the name recently.

Mr. Esposito: They sell drugs wholesale?

A. Yes sir.

Q. And this file contains all the receipts and drugs you bought since you were in practice?

A. Yes sir.

Mr. Esposito: We offer it.

The Court: Received. (Marked "Defendant's Exhibit E")

Mr. Esposito: And this other one (indicating)?

A. Upjohn Company.

Q. And the Upjohn Company is a wholesaler in drugs? A. Yes sir. [309]

Q. And it's located where?

A. San Francisco.

Q. And this file contains all the receipts and vouchers of all the drugs you purchased from this Company? A. Yes sir.

Mr. Esposito: We offer it, Your Honor.

The Court: Admitted. (Marked "Defendant's Exhibit F")

Mr. Esposito: And what does this file read, Doctor? A. S. E. Massengill, San Francisco.

Q. And that is also a drug company?

(Testimony of Peter Young.)

A. Yes sir.

Q. And this file contains all the receipts and vouchers of the drugs you purchased while you were in practice?

A. Yes sir.

Mr. Esposito: We offer it, Your Honor.

The Court: Admitted. (Marked "Defendant's Exhibit G")

Mr. Esposito: And this one, Doctor (indicating)?

A. Lam's Pharmacy and Phillips Pharmacy together, incorporated; it used to be Lam's Pharmacy, but now it's Phillips'.

Q. That is, it's resident in Honolulu, this company?

A. Yes sir.

Q. And it also deals in wholesale drugs?

A. Well, it specially compounds drugs for me.

Q. But it sells drugs?

A. Yes.

Q. And this file contains all the receipts and vouchers of the drugs you purchased from this corporation while you've been in practice in Honolulu?

A. Yes sir.

Mr. Esposito: We offer it, Your Honor.

The Court: Admitted. (Marked "Defendant's Exhibit H")

Mr. Esposito: And this file represents what, Doctor? [310]

A. That's McKesson, Honolulu.

Q. That also is a drug company?

A. Yes sir.

(Testimony of Peter Young.)

Q. And this file contains all the receipts and vouchers of all the drugs you purchased while you were in practice in Honolulu? A. Yes sir.

Mr. Esposito: We offer this, Your Honor.

The Court: Admitted. (Marked "Defendant's Exhibit I")

Mr. Esposito: And this one, Doctor?

A. American Factors, Honolulu.

Q. That is also a corporation that sells wholesale drugs? A. Yes sir.

Q. And this file contains all the receipts and vouchers of all the drugs purchased by you while you've been in the practice of medicine in Honolulu? A. Yes sir.

Mr. Esposito: We offer this, Your Honor.

The Court: Admitted. (Marked "Defendant's Exhibit J")

Mr. Esposito: And this last one, Doctor?

A. Science Supply.

Mr. Moore: That's a different institution, that's a name of an institution or company or store or something?

A. Yes, that's a store in Honolulu.

Mr. Esposito: That sells drugs?

A. That sells office supplies.

Mr. Moore: Does that have anything to do with drugs?

Mr. Esposito: Does this have anything to do with drugs? A. No, not this one.

Mr. Esposito: Then we don't offer it.

(Testimony of Peter Young.)

Mr. Moore: What is this book here, again, Doctor? [311]

A. This is according to that Article 179; instead of the narcotic agents requiring that you have to keep their record, I thought it was a lot of work so I kept this record of drugs bought and drugs exhausted; so that is this record here.

Mr. Moore: Let me see that, will you please.

(Mr. Esposito hands book to Mr. Moore).

Mr. Moore: Now, Doctor, adverting to this book; you mentioned that this was a record of what?

A. It was a routine of inventory, drugs bought and exhausted.

Q. And that's a record of your office?

A. Part of it, yes.

Q. You mentioned, I think, a rule or Article 179? A. Yes.

Q. And what is that Article, if you know?

A. I just say, in place of the record required by law this may be used for you to just put down the drugs you bought, the date bought and date exhausted, and could serve in place of the record.

Q. And that is in regard to what kind of drugs, Doctor? A. Narcotics in general.

Mr. Esposito: We offer it.

Mr. Moore: We have the same objection to that, Your Honor, that it is not pertinent.

The Court: Received in evidence.

(Marked "Defendant's Exhibit K")

(Testimony of Peter Young.)

Mr. Esposito: Now Doctor, what do you understand by a "stock preparation" in the parlance of medicine?

A. Well, any drug bought from these wholesale manufacturers.

Q. And would you call Paregoric a Stock Preparation? A. It is. [312]

Q. Would you call the preparation alleged in Count Four, Linctus Compound, a stock preparation? A. Yes sir.

Q. Would you call the drug alleged in Count Five as Codeine Phosphate a stock preparation?

A. Yes, I do.

Q. What is the full name of this drug designated in Count Five as Codeine Phosphate?

A. It's Codeine Phosphate Cough Syrup.

Q. Codeine Phosphate Cough Syrup?

A. Yes.

Q. What is the full name of the drug alleged in Count Four as Linctus Compound?

A. Linctus Compound Cough Syrup.

Q. Cough Syrup? A. Yes.

Q. In Count Six the United States Government alleges a drug known as Sedatole; what is the full name of that drug?

A. Sedatole Cough Syrup; you see, all these cough syrups should be grouped according to my opinion under one count; just because I buy from different companies it's different counts.

(Testimony of Peter Young.)

Q. But that is known as Sedatole Cough Syrup?

A. Yes sir.

Q. And do you consider that a stock preparation?

A. Yes sir.

Q. In Count Seven the United States Government alleges a drug in the words "Camsalide Tablets"; what is the full name, if any, of this?

A. Camsalide Cold Tablets.

Q. And do you consider that a stock preparation?

A. Yes sir.

Q. In Count Eight the United States Government alleges a [313] drug as Stokes Expectorant; has that any other name?

A. Stokes Cough Syrup.

Q. Stokes Cough Syrup?

A. Yes.

Q. And do you consider that as a stock preparation?

A. Yes sir.

Q. In Count Nine the United States Government alleges a drug as Syrup Eucillana Compound; has that any other name?

A. Ueillana Cough Syrup, or Cocillana Cough Syrup, the old name.

Q. And is that considered by you as a stock preparation?

A. Yes sir.

Q. And in Count Ten the United States Government alleges a drug designated as Expectorant No. 6; has that any other name, Doctor?

A. Expectorant 6 Cough Syrup.

Q. Cough Syrup?

A. Yes.

(Testimony of Peter Young.)

Q. And do you consider that as a stock preparation?
A. Yes sir.

Q. So you were acquainted, Doctor, when you practiced medicine, with this regulation that they call Article 179?
A. Yes sir.

Q. About stock preparations?

A. Yes sir.

Q. And, as I understand your testimony, this book is a record of all stock preparations dispensed and used in your practice of medicine, is that correct, Doctor?
A. Yes sir.

Q. And, Doctor, when you dispensed or distributed all these stock preparations alleged in all the counts of the indictment, are they all the quantities of all these drugs alleged in all the counts; have you notations in this record of all these drugs as stock preparations, in this book? [314]

A. Yes sir.

Q. Now, Doctor, advertng to Count Four, the United States Government charges you with dispensing, distributing and otherwise giving away 16 gallons and two pints of a preparation and remedy which did not contain more than one grain of Codeine to the fluid ounce, to-wit, Linetus Compound. During the same period of time, to-wit, Doctor, from August 26, 1937, to July 21, 1939, did you dispense that amount of drug of this Linetus Compound within the time alleged by the United States Government?
A. Yes sir.

(Testimony of Peter Young.)

Q. And did you keep a record according to the regulations of the Commissioner of Internal Revenue with the names, dates, and the amounts?

A. No sir.

Q. Why, Doctor, didn't you keep such a record of this drug when you dispensed it?

A. It wasn't necessary, and I have what they call Article 179 to go by and while they are in personal attendance.

Q. When you distributed all this amount, to wit, 16 gallons and two pints in the approximate period of 24 months, you gave it to different patients in personal attendance? A. Yes sir.

Q. Did you ever give any drug, as they call it, Linctus Compound, straight without mixing it with other drugs?

A. Well, as cough syrup sometimes.

Q. And you wouldn't administer it other times, if any?

A. Well, it depends on the diagnosis; if it calls for one I give it, and if it calls for two I mix the two.

Q. What two would you mix with it?

A. Well, if it requires a little more Paregoric when it's indicated. [315]

Q. This Linctus Compound, do you recall off-hand what narcotic it contains?

A. It has Codeine about half a grain to one fluid ounce, mixed with four different ingredients.

(Testimony of Peter Young.)

Q. Is this an exempt preparation according to the Harrison Narcotic Act? A. Yes sir.

Q. And for what purpose is it used in the practice of medicine? A. It's a plain cough syrup.

Q. Well now, I don't know what you give cough syrup for; what disease do you give it for, if any?

A. Well, for coughs due to acute bronchitis, chronic bronchitis, tuberculosis, asthma, acute laryngitis, chronic laryngitis; all coughs.

Q. In dispensing or distributing this would you first make a diagnosis of the patient; how would you determine the dose or the mixture or the concoction?

A. Well, according to the age of the patient; if a child, I give a teaspoonful, and if an adult, I give maybe two or three teaspoonfulls; if, in his judgment, a tablespoonful may be necessary; in fact, it's on the bottle, it says "Two or three teaspoonfulls every two or three hours, or as directed by the physician".

Q. So that, you would first make a diagnosis and take all the surrounding circumstances, like the age, weight, and size of the patient, and then approximate a dose? A. Yes sir.

Q. And is that the fair and usual practice of medicine?

A. Yes, that's the routine practice according to the age.

Q. Now, adverting to Count Five, Doctor; it alleges that [316] from the same August 26th, 1937,

(Testimony of Peter Young.)

to July 21st, 1939, in Honolulu, you did sell, dispense, distribute and give away two gallons and one quart of a preparation and remedy which did not contain more than one grain of Codeine in one fluid ounce, to-wit, Codeine Phosphate. Did you distribute that amount or more than that amount within the period as charged?

A. That was the amount.

Q. That was the amount? A. Yes.

Q. And this is an exempt preparation according to law? A. Yes sir.

Q. Did you keep written records as required by the Internal Revenue concerning dispensing of this drug? A. Not as they required.

Q. What kind, if any, record did you keep?

A. Well, just that Article 179, that's all, and I thought it was sufficient.

Q. And, Doctor, did you give any part of this amount, to-wit, two gallons and one quart, of the preparation Codeine Phosphate Cough Syrup, did you give any of that away when you were not in personal attendance of the patient?

A. Never; I never give any medicine without a diagnosis; always in personal attendance.

Q. Always personal attendance? A. Yes.

Q. Now, adverting, Doctor, to Count Six; again the United States Government alleges that from August 26th, 1937, to July 21st, 1939, at said Honolulu, you did sell, distribute, dispense and give

(Testimony of Peter Young.)

away 5 gallons and 28 ounces of a preparation which did not contain more than one grain of Codeine in one fluid ounce, to-wit, Sedatole, without keeping a record. Did you distribute that amount or more than [317] that amount within the time alleged, Doctor? A. That amount.

Q. You did? A. Yes.

Q. How did you distribute it?

A. Well, as cough syrup, and sometimes mix it with this Paregoric. For example, someone wants a cough syrup to try it out, and if that isn't effective soon he comes back again, and I examine the chest and order a little more stronger alcohol and mingle in the Paregoric; they come back and say they feel much better. Sometimes a few patients like this Brother of St. Louis College, they like it and say it's good, they come back for another bottle; and also the manager of Liberty Bank, I give him a bottle, he says it's very good; so I continue with that recipe whenever he has a cough.

Q. For any part of the drug and the amount as alleged did you ever distribute or dispense any of it that you weren't in personal attendance?

A. I was in personal attendance.

Q. Doctor, did you keep a record as required by the Internal Revenue in regard to the name, address, and amount to the patient? A. No sir.

Q. Did you keep any kind of a record concerning this dispensing?

(Testimony of Peter Young.)

A. Well, I keep the date of when I bought it and exhausted that preparation.

Q. In this same stock record book?

A. Yes sir.

Q. Referring to Count Seven, Doctor, the United States Government charges you from the same date August, 1937, to July, 1939, in Honolulu, that you did dispense and give [318] away 1,371 one-quarter grain tablets of a preparation and remedy which did not contain more than two grains of opium in one avoirdupois ounce, to-wit, Camsalide Tablets; did you distribute that amount or more than that amount in the stated period?

A. That said amount.

Q. And did you give them as a physician in the practice of your profession?

A. Yes sir.

Q. And were you in personal attendance when you dispensed all these drugs?

A. Yes sir.

Q. Did you keep a record as required by the Internal-Revenue Commissioner?

A. No sir.

Q. Did you keep any record of this dispensation?

A. No sir.

Q. Now, as to this stock record that you offered as an exhibit, is there an entry of your Camsalide Tablets in that book as a stock preparation?

A. Yes sir.

Q. Now as to Count Eight; the United States Government charges you between the same period that you gave away eight gallons and two quarts of

(Testimony of Peter Young.)

a preparation known as or designated as Stokes Expectorant; did you give that amount or more than ~~that~~ amount during the period alleged?

A. That amount.

Q. And you dispensed this in your practice?

A. Yes sir.

Q. And was any part of this drug given or dispensed by you when you were not in personal attendance?—[319]

A. No.

Q. And did you keep a record as required by the Internal Revenue Commissioner concerning this amount of drug during this period?

A. No sir.

Q. Did you keep a record in the stock exhibit book that you offered? A. Yes sir.

Q. Doctor, advertng to all the drugs alleged in the entire eight counts, did you at any time distribute any of those drugs when you were not in the practice of your profession of physician and surgeon? A. Never.

Q. All this dispensation and distribution that you've testified to has always taken place within the course of your practice? A. Yes sir.

Q. Now, Count Nine alleges the same date and the same terms as so many times repeated, and the United States Government charges you with dispensing two gallons and eight ounces of a preparation and remedy which did not contain more than

(Testimony of Peter Young.)

one-quarter of a grain of Morphine in one fluid ounce, to-wit, Syrup Eucillana Compound; did you distribute that amount or more than that amount within this period of time, Doctor?

A. That's the amount.

Q. And was that distribution and dispensation in your personal attendance to your patients?

A. Yes sir.

Q. Within your practice? A. Yes sir.

Q. Did you keep a record of this drug and this amount as [320] required by the Internal Revenue regulations? A. No sir.

Q. Did you keep a record of the amount purchased and the amount exhausted in this stock book exhibit? A. Yes sir.

Q. Now adverting to the last count, again the United States Government charges you, Doctor, during the same period of time enumerated, with dispensing and giving away three-gallons and one quart and 28 ounces of a preparation and remedy which did not contain more than one-quarter grain of morphine in a fluid ounce, to-wit, Expectorant No. 6; did you dispense and distribute that amount or more than that amount within the time and period alleged? A. That's the amount.

Q. And did you distribute the same in personal attendance to your patients?

A. Personal attendance.

Q. And did you distribute the same amount while you were in the practice of your profession?

(Testimony of Peter Young.)

A. Yes sir.

Q. And did you keep a record of this amount during this period alleged as required by the Commissioner of Internal Revenue?

A. No sir.

Q. Did you keep a record of the amount as to the time purchased and the time exhausted, in this stock book exhibit of yours?

A. Yes sir.

Q. Now Doctor, you heard the narcotic agent Mr. Barthelmess testify yesterday in this court?

A. Yes sir. [321]

Q. Do you recall in his testimony where he said he had some conversation with you in regard to enforcement of the narcotic laws?

A. No, he never warned me about keeping the record.

Q. He never warned you about keeping the record?

A. No.

Q. What is your record he said yesterday that he warned you, do you recall what Mr. Barthelmess said?

A. He questioned me; he said, "You know this patient came to you?" I said "Yes". He said, "What date?" He took the date and off he went.

Q. When was that, what month or year?

A. I think that was in January.

Q. In January of what year, Doctor?

A. This year.

Q. And you say he did not warn or caution you to keep records as required by the Internal Revenue then?

(Testimony of Peter Young.)

A. No, he never mentioned anything about records.

Q. When was the first time that Mr. Barthelmess or any narcotic agent talked to you about the rules and regulations and the record as required by the Internal Revenue Commissioner?

A. He came on July 20th of this year and told me that I would have to keep a record and they demanded that record and I told him I didn't have such record.

Q. You told him you didn't have such record?

A. No record.

Q. As he required? A. Yes.

Q. Did you tell him why you didn't have such record?

A. Well, I told him it wasn't necessary.

Q. Did you use the word "necessary", or that it was not required? [222]

A. Not required.

Q. How long a time did you have a talk in this July conversation with Mr. Barthelmess about these rules and regulations of the narcotic laws?

A. Oh, about half an hour to three-quarters of an hour.

Mr. Moore: That's in January?

A. No; in July.

Mr. Esposito: How long did you talk to Mr. Barthelmess in January, approximately?

A. Oh, just a few minutes about five minutes.

(Testimony of Peter Young.)

Q. Do you recall anything else of this patient he asked you about in January?

A. He began asking me about the patient's diagnosis, and this and that.

Q. What patient? A. This Irene Fuller.

Q. Well, we don't claim the name, we don't want the name of the patient, but what kind of disease was this patient suffering from, if any?

A. Renal colic.

Q. What's renal colic?

A. Stones in the kidney.

Q. And was she a patient of yours, Doctor?

A. She was, yes sir.

Q. And he inquired about that patient?

A. Yes sir.

Q. And did you give the diagnosis?

A. Yes sir.

Q. And your treatment of that patient?

A. Yes sir.

Q. Did he at any time before July caution or warn you what the Internal Revenue Commissioner or his agents required as to a record of narcotics? [323]

A. Never; they never showed up between that time.

Q. He never cautioned you? A. Never.

Q. The first time you had a talk with him or any agent was in July, you say, of 1939?

A. Yes sir.

(Testimony of Peter Young.)

Q. Did you write this letter, the exhibit introduced by the prosecutor yesterday, Doctor, to Mr. Stevenson, which is United States Exhibit No. 2?

A. Yes I did, by request.

Q. That is your handwriting, Doctor?

A. Yes sir.

Q. And that is your signature?

A. Yes sir.

Q. If you'll read that to refresh your recollection, Doctor.

A. (Reading exhibit): "As requested by phone—

1. Why do I use so much Paregoric?

I use Paregoric to mix Cough Syrups, Corrective, Parepeptol and English Stomach Powder, especially compounded for me by Lam's Pharmacy.

2. Why do I use Paregoric?

I get better results by fortifying the above preparations with Paregoric.

3. Why no label on that bottle?

Because that patient told me that it was unnecessary as he understood the directions I gave him in Chinese and that he couldn't read English anyway."

Q. And how did you sign that?

A. "Yours truly, Dr. P. L. Young."

Q. And that is dated July 24, 1939?

A. Yes sir.

Q. Was that after you had the talk with Mr. Barthelmess?

A. Yes sir.

(Testimony of Peter Young.)

Q. Where did you get these three questions "Why do I use so [324] much Paregoric" and so forth; were they original with you?

A. No; Mr. Barthelmess asked me on the 'phone.

Q. He asked you on the 'phone?

A. Yes sir.

Q. Those questions, and for you to write an answer? A. Yes sir.

Q. And to mail it to the office of Mr. C. T.—who? A. C. T. Stevenson.

Q. And that is the same gentleman who is the head of the Narcotic Division in Honolulu for the Territory? A. Yes sir.

Q. And you mailed this to him?

A. Yes sir.

Q. Mr. Barthelmess called you up about that, Doctor? A. Yes, he did.

Q. About those questions? A. Yes sir.

Q. Did he tell you you didn't have to answer them and you had the privilege according to the Constitution not to give evidence against yourself; did Mr. Barthelmess inform you of anything like that? A. No, no.

Q. You did that voluntarily, of your own free will, and wrote that letter?

A. Well, he asked me to, and I thought I was compelled to do it.

Q. And you did it of your own free will?

A. Yes.

(Testimony of Peter Young.)

Q. You never studied law, did you, Doctor?

A. Never.

Q. Doctor, in all your dispensations of all the drugs we have previously mentioned, of all the preparations and drugs alleged in all the counts of this indictment, did you ever prescribe any part of all those drugs alleged in all [325] those counts with the intent to evade the provisions of the narcotic laws?

A. Never, no sir.

Mr. Esposito: You may cross-examine, Mr. Moore.

The Court: We'll take a recess at this time for five minutes.

(Recess—10:58 to 11:06 a. m.)

Cross Examination

By Willson C. Moore, Esq.

Q. Now Doctor, did you keep any record at all with reference to your narcotics?

A. Well, just my routine inventory, that record, the book what you took away from me and is still in your possession.

Q. Those are the only ones?

A. That's the only ones, yes.

Q. This book that you say we took away from you, is this (indicating) the book you refer to?

A. Yes sir.

Q. That's your narcotic record?

A. Yes sir.

(Testimony of Peter Young.)

Q. Does that give names, dates, addresses, and quantities?

A. Dates and names and quantities without the addresses.

Q. It doesn't give addresses?

A. Well, I refer them back to my file.

Q. Well, aren't you familiar with the rule that you're supposed to give the address of these people?

A. Well, I don't have to what they call follow the rule if I think what I am doing was right.

Q. In other words, if you think what you're doing is right you think you can make your own rules and go ahead?

A. I don't think that way.

Q. Then this book here that's shown you, that has to do with [326] Morphine and Codeine and Cocaine and things of that kind?

A. Yes; what about it?

Q. Isn't that right? A. Yes.

Q. And even this book you didn't keep properly, did you; you didn't put the address down so that if a narcotic agent went there and found out somebody is going to your office all the time they could find out who it was?

A. Well, I refer back to the card to give them the address that way, that's part of my record.

Q. You say that you kept this book over here; what do you call it?

A. It's simply ordinary bookkeeping and sort of inventory.

(Testimony of Peter Young.)

Q. No; this book here; you say when you made preparations and exhausted them—

A. Yes, order book.

Q. Where did you get the interpretation to keep this record?

A. Well, that's part of my bookkeeping routine.

Q. Well, you say that you kept it in accordance with regulation 179? A. Yes.

Q. Did you read regulation 179?

A. I read it long ago.

Q. And did you read the other regulations long ago too? A. Yes, I did.

Q. Now Doctor, when we say that a doctor administers something to a patient, what do you take that to mean? A. Administer?

Q. Yes.

A. When you say "administer" you mean administer alone; when the book says "administer" it says things you dispense [327] or distribute in personal attendance.

Q. That's what you would say? A. Yes.

Q. Would you say if a person came in with a broken leg and before you set his leg you gave him a shot of morphine in the arm, would you call that administering? A. Yes.

Q. Would you call that "dispensing"?

A. Well no, that's only part of it; your administration is part of it, yes.

Q. Now let me read to you, Doctor, this Sec. 179: "A practitioner who, in his office practice,

(Testimony of Peter Young.)

administers minute quantities of narcotics in stock preparations, may keep, as to such preparations, in lieu of the record required by Art. 177,"——

A. Yes.

Q. That is, when you administer stuff in your office directly to a patient, that is, you give him a pill, that you give him a shot in the arm, you give him a teaspoonful of medicine that's in a preparation, then you can keep this book you speak of, isn't that correct?

A. No; if you give a bottle of medicine, any think-like that, it includes that too; you only have your side of the story.

Q. When you got your narcotic record you checked up on what exempt preparations were, didn't you, you as a doctor checked up and know what exempt preparations are?

A. Of course I do.

Q. And when you speak of exempt preparations, generally speaking that is a medicine or remedy that contains narcotics and does not have to be purchased on an order form?

A. No, that's right.

Q. That's correct, isn't it?

A. Yes. [328]

Q. And that this Paregoric, and Stokes Expectorant, and Expectorant No. 6, and Camsalide Tablets, and the lot here all come within the category under that note of exempt preparations?

A. They are exempt, yes.

(Testimony of Peter Young.)

Q. You could purchase them without using an order form? A. That's right.

Q. And these order forms are furnished to all registrants such as yourself and others so that if you want to purchase Morphine, Cocaine, Heroin, Tincture of Opium, or any drug that is not, as we may say, diluted or with just a limited amount of drug in a preparation, you use the order forms for those, don't you? A. Yes.

Q. And those that you don't have to use order forms for and have drugs in them are exempt preparations? A. Yes.

Q. Did you ever check up on exempt preparations which are right in this same rule book that you have this 179 in, the very next one?

A. Yes.

Q. It gives you exempt preparations, and the first part of it gives the description of what exempt preparations are; "preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce;" Then it goes on to say that they are exempt from this law if they are dispensed properly, that is, as medicines, and further, "That any [329] manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and reme-

(Testimony of Peter Young.)

des"—that's these exempt preparations—"shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue" may approve, for a period of two years, so these boys can come in and inspect them. A. Yes.

Q. What did you take that to mean?

A. Well, that's your requirement, and there are exceptions to the rule that I think I'm right, and it's in the book there, the two exceptions:

Q. The exception says "administers minute quantities"; and the other is directly with remedies; then we go over here in the same book, go over just another page and we have here: "Every manufacturer, producer, compounder, or vendor (including dispensing physicians); of exempt preparations"—that's these ones that contain these lesser amounts of narcotics—shall keep records of "all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery"; then we come down here and it gives you exactly what you shall put in your book, the date of delivery, your registered number; the name of the person you give it to, that person's address, the name of the preparation, and then the quantity.

A. All right; this is the part here; it says: "To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the

(Testimony of Peter Young.)

course of his professional practice only: Provided, That such physician, [330] dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed", that's what you said; you pay no attention to a comma or semi-colon—"except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act."

Q. Wait a minute; just keep that place there; is that under the exempt preparations over here (indicating), or is that under the drug itself?

A. This is in general all narcotics, and exempt preparations come under that too.

Q. Here (indicating) it is with reference to exempt preparations, and tells you the record to be kept.

Q. Yes, that's the article put up by the Treasury, but that's copied from the section of the law.

Mr. Esposito: May I interrupt for the record's sake; what section did the witness read—Sec. 2(a)?

Mr. Moore: Section 2 (a), yes.

Mr. Esposito: May the record indicate that reference to that section.

(Testimony of Peter Young.)

Mr. Moore: And did you read that with reference to the exempt preparations that you are supposed to keep a record of?

A. What was the question?

Q. Have you ever heard of keeping a record of exempt preparations? [331]

A. I asked about ten doctors, and maybe one keeping a record, and he told me "You don't have to".

Q. Did you ask any of the narcotic boys?

A. Never had occasion to meet them; I had so many doctor friends that say "No, you don't have to keep a record of exempt preparations".

Q. Do you remember having a conversation with Mr. Weber of the Hospital Purveyors, Ltd.?

A. Yes.

Q. Do you remember him telling you "Well, Doctor Young, you're buying an awful lot of Paregoric; you better look out"?

A. Yes, for every gallon Paregoric I buy many gallons of cough syrup to mix up; in your indictment you knock out the cough syrup and put in the Paregoric; I got vouchers to show I got more cough syrup than Paregoric; there wasn't a complete investigation by the narcotic agents; I got vouchers to show that I got more gallons of cough syrup than Paregoric.

Q. Why, Doctor, did you take and spread these purchases of Paregoric, which seems to be your

(Testimony of Peter Young.)

biggest amount here, over seven different drug houses?

A. You know why; because I want to give every house a break, give them a chance; they come round to get orders, and I hate to see them go away without an order; I say, "All right, give me one gallon cough syrup and one gallon of Paregoric to mix with it."

Q. With reference to Paregoric, did you ever hear of any Paregoric addicts?

A. Well, I heard of Paregoric addicts, yes, but I don't give it to them straight.

Q. There's a whole lot of them coming back out there all [332] the time to you to get this Paregoric, and you mix other stuff with it?

A. They come back; I look back on their card, I ask them "When was the last time you been here?" They tell me, and I examine them; and I say, "You follow the directions on the bottle, take a teaspoonful or two teaspoonfulls every three hours"; they suffering with lung disease; lung disease is incurable, and I'm just relieving it, and they feel better and sleep better; and I believe I'm right in administering it.

Q. When you say you've been relieving, the relief that you've been giving is a relief from their pains for narcotic addiction from giving them this stuff?

A. That's what you say.

Q. Isn't that what you say, that's what I'm asking you?

A. No sir, that's not right.

(Testimony of Peter Young.)

Q. Don't you know, Doctor, that this amount of Paregoric that you sold is at least ten times more than any other doctor in town?

Mr. Esposito: I object, if Your Honor please; comparisons with what other doctors do is irrelevant and immaterial.

The Court: The question was, "Don't you know?"

Mr. Esposito: And I still object, Your Honor: it introduces irrelevant evidence, because the Narcotic Act doesn't prohibit the amount.

The Court: I think it's immaterial; sustained.

Mr. Moore: Do you remember when Mr. Barthelness came to your office in July of this year and asked you for your narcotic record?

A. Yes. [333]

Q. And what did you give him?

A. I give him what I had.

Q. All right; what did you give him?

A. That book there (indicating).

Q. And did you tell him that you had any other book?

A. No, I just give him what he demands, what he ask for.

Q. He asked you for a narcotic record, didn't he?

A. Yes.

Q. And what did you give him?

A. I gave him that book there.

Q. That one that you said they took away from you?

A. No.

(Testimony of Peter Young.)

Q. Did he ask you if you had any other record?

A. No, no.

Q. You didn't say you had any other record?

A. No, I didn't.

Q. When did you make that record in the little brown book?

A. Practically in August 25, 1937, of different things besides all these.

Q. And you've had this in your office since 1937?

A. Yes.

Mr. Moore: (To the jury): Gentlemen, I want you to take a look at that book; it hasn't got the shine off yet; Defendant's Exhibit "K".

Q. Who made these entries here?

A. My wife.

Q. When did she make that?

A. The date there.

Q. On that particular date?

A. Yes.

Q. Each one was made on the dates that they got here?

A. Yes. [334]

Q. It wasn't made since this trial started?

A. No, no.

Mr. Moore: (To the jury): Take a look at those —

Mr. Esposito: We object, Your Honor.

Mr. Moore: This is in evidence.

Mr. Esposito: You wait until the argument: I object, Your Honor; this is misconduct.

Mr. Moore: I can exhibit to them articles that are in evidence.

(Testimony of Peter Young.)

Mr. Esposito: Your Honor, I want a ruling on this unethical conduct to prejudice and influence this jury against the defendant.

The Court: Overruled.

Mr. Esposito: Your Honor will allow me an exception for the reasons stated. Your Honor, I want the record to show that the prosecutor in person has demonstrated this to the jury, that my objection was taken to his personal demonstration of it to the jury.

Mr. Moore: You introduced this in evidence; the jury is entitled to see anything in evidence.

The Court: Proceed.

Mr. Moore: You kept a record here of your narcotic drugs, that is, such as morphine and tincture of opium; that is, it made the drugs that you got on order forms as distinguished from exempt preparations; why didn't you keep them on exempt preparations?

A. Well, the doctors told me you had to keep a separate book.

Q. The doctors told you you had to keep a separate book: did you keep a separate book?

A. Yes.

Q. You kept this book (indicating)?

A. That book, yes. [335]

Q. And this one here that the jury have?

A. Yes.

Q. And when Mr. Barthelmess came around and asked for your records, your narcotic record, all you gave him was that?

(Testimony of Peter Young.)

A. He asked for that book.

Q. He asked for that book?

A. The narcotic book, yes.

Q. Is this it, the narcotic book (indicating the book handed to the jury)?

A. No, I look upon that as the stocks bought and the inventory; I got a lot of more books to show.

Q. Don't you remember that Mr. Barthelmess, when he first went into your office on July 20th, the first thing he asked you was for your exempt narcotics book? A. Yes.

Q. And you said you didn't have any?

A. Well, because the way he said, they want the name and address and everything; I haven't got it that way, I got it my way.

Q. Didn't they just ask you for the exempt narcotics book, and you said you didn't have any?

A. Yes.

Q. And this, you say, is your exempt narcotics book?

A. It's part of my books; that's no special book, it contains other things besides exempt preparations; that's routine there, inventory; an exempt narcotics record is not the same thing as an inventory or stocks or anything like that.

Q. Now Doctor, you say Mr. Barthelmess went to see you in January with reference to somebody by the name of Irene Fuller? A. Yes.

(Testimony of Peter Young.)

Q. Are you sure that it wasn't Marie Randolph? [336]

A. I have to look up my file before I could answer that.

#Q. I'll show you a prescription here, Doctor; and maybe that will refresh your recollection.

Mr. Esposito: We object, if Your Honor please, to the comment, and request that the Court instruct the prosecutor to refrain from making personal remarks.

The Court: Objection overruled.

Mr. Esposito: Your Honor will allow me an exception for the reason stated.

The Court: Just what was the personal comment that you're objecting to?

Mr. Esposito: I don't know, Your Honor; he made a comment about a prescription he held as he came by the jury; I can't even hear him.

Mr. Moore: Read him the statement, will you, Mr. Reporter; I have nothing to hide.

(Reporter reads first question on this page, marked #)

The Court: Now, don't make frivolous objections.

Mr. Esposito: I did not intend it as a frivolous objection; if Your Honor will watch Mr. Prosecutor, he's waving to the jury; and I want the record to show that my objection is based on his conduct.

Mr. Moore: Do you want me to be a sphinx?

Mr. Esposito: No. I claim it's misconduct on the

(Testimony of Peter Young.)

part of the prosecutor to influence the jury against this witness.

The Court: The Court saw no evidence of that.

Mr. Moore: Have you taken a look at that, Doctor?
A. Yes.

Q. After seeing this prescription would you say that this first call to you in January was with reference to a [337] Marie Randolph rather than an Irene Fuller?

A. Well, according to that prescription.

Q. According to that prescription that must have been it?

A. There may be another one in January of Irene Fuller.

Q. And, without stating what this contains, this inquiry was with reference to some dispensing of narcotics, and the question of keeping records came up in connection with it, did it not, Doctor; isn't that right?
A. Yes.

Q. And didn't Mr. Barthelmess at that time ask you—or the substance of his conversation was that you be sure and keep a proper record?

A. Yes.

Q. Is that right? A. Yes.

Q. And you told him that you were keeping a proper record?

A. Well, he came over there and said—he asked me for a name, but he didn't produce that one there; that's the first I've seen that.

(Testimony of Peter Young.)

Q. Well, that's your prescription, though, Doctor?
A. Yes; I mean, seeing it from him.

Q. Your office is located where, Doctor?

A. College Walk and Vineyard.

Q. And you have an office girl, do you?

A. Yes.

Q. Does your wife work in the office, or not?

A. After school, yes.

Q. After school? A. Yes.

Q. Well, after school, when does your wife get out of school?
A. Two-thirty.

Q. And then from two-thirty on you have your office girl and your wife there too?

A. Yes. [338]

Q. Every day?

A. Well, she's been going down there until just about lately she resigned from school.

Q. And she's at your office all the time now?

A. Well, she try to help me with bookkeeping.

Q. When you first started out you say you were making about \$100.00 to \$150.00 a month?

A. The first month; then it adds.

Q. Now, at the present time, you say, you're grossing somewhere around \$1,500.00?

A. Almost \$1,500.00, for a year, yes.

Q. I think you've got in one of your books here a figure of a gross—\$1,538.25; that is the gross cash receipts in your office?
A. Cash.

Q. In your office? A. Yes.

(Testimony of Peter Young.)

Q. That doesn't take into account what you put on the books? A. No.

Q. And tell me, Doctor, this practice that you built up is very closely connected, is it not, with your use of these exempt narcotic drugs?

A. No.

Q. Now, does this book, which is Defendant's Exhibit "K", contain all the Paregoric that you bought? A. Yes sir.

Q. You didn't start to buy any Paregoric until October, 1938? A. As it states there.

Q. Well, is that right? (handing book to witness). A. Yes.

Q. You didn't buy any before that at all?

A. No. [339]

Q. You're sure about that? A. Yes.

Q. You haven't got a record of when you advanced in practice by months, have you?

A. Of what?

Q. That is, the way your volume jumped up?

A. Yes, I have; the other red and black book; (indicating Defendant's Exhibit "A"); the first month, \$127.00 cash—

Mr. Moore: This is the record, going down?

A. Yes; and then \$258.00, \$259.00; it goes up gradually.

Q. Starting, then, in September, 1937, you made \$127.00; and then you didn't come up to \$400.00 until June 1, 1938? A. Yes.

(Testimony of Peter Young.)

Q. And then in September you got \$594.00, and then in October you got \$1,078.00? A. Yes.

Q. And from then on it climbs up continually, until in July it slumped off? A. Yes.

Q. Probably because you got "pinched" in the middle of the month? A. Pinched?

Q. Arrested.

A. No; I am carrying my usual practice; I buy still about three or four gallons a month.

Q. Now, you say, Doctor, that you examined all of these patients; every time they come in, before you give them any of this Paregoric or this Expectorant No. 6 fortified with Paregoric, or either way, any way you give it, you give them an examination? A. Of course I do. [340]

Q. Every time? A. Everyone, every time.

Q. And you never delivered any to anyone without an examination? A. No, never.

Q. You say that you've given some of this to a man in the Liberty Bank? A. Yes.

Q. What's his name? A. Chun Kow.

Q. Do you remember the day that Mr. Barthelmess came down there in July? A. Yes.

Q. You remember while you were there you got a telephone call from Chun Kow? A. Yes.

Q. And you told Chun Kow over the telephone to send his boy around to get the bottle?

A. No, no, no; he said like this; he said, "You give me that Paregoric; I have slept very good, and I want another bottle same thing." I examined him

(Testimony of Peter Young.)

before I started giving him that medicine; so there's nothing wrong in giving a refill.

Q. Well then, you don't examine them every time they come in to get a bottle?

A. As a usual practice, I do; there are exceptions, when they want the same medicine and follow the same dosage, then you may let them have it.

Q. When he calls up on the telephone do you consider that "personal attendance" too?

A. Well, if I take this bottle down there and give it to him— [341]

Q. But if his boy comes up to your office and gets it?

A. I wouldn't give it to anybody that comes around for a bottle—

Q. Well, didn't you tell this man over the telephone that he could send his boy down and could take it?

A. No, I didn't say that.

Q. Now Doctor, I imagine you must have a pretty good sized drug list up there?

A. Oh yes; I buy about \$500.00 worth of drugs.

Q. And you get Expectorant and Paregoric, and what have you, and a man comes in and he tells you something and you measure out about half Paregoric and half Expectorant No. 6 and give him this bottle?

A. I naturally diagnose his case and see if he needs more out of each.

Q. And then after diagnosing his case you take and make up the mixture for that particular man?

D

(Testimony of Peter Young.)

A. Yes.

Q. And then if he comes back, if he runs out of it and comes back and wants some more, you look to see what he had before and give him some more of that, is that right?

A. Well, I always look him up, and if he's there and he requests it I give it to him.

Q. Do you mean to tell us, Doctor, that if you diagnose a man who has got a cough or a belly-ache or whatever it is there, you figure up a preparation of medicine that he needs, that each time he goes in there you examine him, take your finger and thump his chest over and take out your stethoscope and get one of these "two by fours" to put down his throat to see if his tonsils are out; do you go through [342] that rigamarole every time?

A. Well, I'll see whether they are getting worse or better or getting tuberculosis or not, or whether they are developing asthma on top of that; they all say I am a very good doctor, "every time we come to you you give us special attention", and I gain their confidence.

Q. What do you usually charge?

A. We charge two dollars a visit, and after we charge the medicine we charge them half price.

Q. You mean a dollar, the regular call rate?

A. A dollar, yes; and sometimes if they haven't got the money we charge half a dollar; sometimes I give him free if he says he hasn't got the money.

(Testimony of Peter Young.)

Q. This medicine you say you give them for a dollar next time, what is your average bottle that you give out for these things? A. Four ounces.

Q. Supposing he gets more than four ounces, then what?

A. Well, it's just the same, so long as he follows directions with my suggestion, two teaspoonfuls every three hours.

Q. Did you ever give them a larger bottle than four ounces?

A. Sometimes eight ounces, and that's supposed to last him for so many days.

Q. If you give him an eight ounce bottle what do you charge for that?

A. A dollar for a four ounce bottle, and the same for an eight ounce bottle.

Q. And a dollar for the office call?

A. No, I give him free; that's all included.

Q. If you give him a 16 ounce bottle what do you charge?

A. Well, we just practically charge for the medicine, [343] two and a half or three dollars.

Q. If you give him a sixteen ounce bottle the most you would charge him would be \$2.50?

A. Yes.

Q. Do you know a fellow by the name of Kim Koon Chil, a Korean?

A. Well, I look up the record last night; his name wasn't there.

Q. Do you remember about the time you got

(Testimony of Peter Young.)

arrested that Mr. Barthelmess showed you a bottle that he had taken from this Kim Koon Chil with your label on it? A. I didn't see it.

Q. Didn't you see it down here in the Narcotic Office?

A. Oh, that bottle there was a bottle containing kidney medicine, three tablespoonfulls three times a day; I never give cough syrup of those three tablespoonfulls.

Q. Don't you remember that you took the cork off down there in the Narcotic Office and smelled it and said that that was Paregoric and Expectorant No. 6—oh, I beg your pardon—Expectorant No. 6 and something else; do you remember making that statement? A. Which bottle?

A. That bottle you were shown down there in the Narcotic Office; a bottle like this (indicating).

A. That was another bottle; he showed me an eight ounce bottle and said that one was paregoric, because it said "3 tablespoonfulls"; I said, "It couldn't be that, because I don't give that dosage", and I said, "That's kidney medicine"; I said, "For all you know that's a dope mixture, somebody have put some dope in there and used that label of mine for protection; that wasn't cough syrup at all in

[344]

Q. Well, did it have any exempt preparation in that bottle?

A. No, I didn't put no exempt preparation there.

(Testimony of Peter Young.)

Q. You say you are ~~a~~ graduate from the University of London and the ~~Royal~~ College in London, and so forth; as I understand it, Doctor, you attended the University of St. Louis, at St. Louis, did you not? A. Yes.

Q. And then you came back to the Territory of Hawaii, and then went to London? A. Yes.

Q. And took further studies? A. Yes.

Q. When you came back from St. Louis you did not practice here in the Territory? A. No.

Q. You were not admitted to practice?

A. I just finished my pre-medical course.

Q. That is, by "pre-medical course" you mean that you had actually gotten into medicine proper, is that it? A. Yes.

Q. You say that one out of ten patients that you get at your office you dispense some of these exempt narcotic drugs to? A. Yes.

Q. Oh, Doctor, you said, I believe, that there was Camsalide Tablets in this book, Exhibit "K"; (handing to witness); see if you can find them for me, please.

A. There (indicating).

Q. What do you mean; here's "2D"; what's that? A. "D" is 500.

Q. And "2D" means two times 500?

A. Yes.

Q. Well, according to the Honolulu Medical record you only [345] got 500; you didn't read my

(Testimony of Peter Young.)

indictment and get 1500 out of that, did you?

A. He give me two bottles of 500.

Q. Have you got that record here? A. Yes.

Q. Which one is it of these vouchers?

A. Look for the date November 10th; here (indicating), "2D Camsalide \$3.50".

Q. Referring to the yellow slips on Defendant's Exhibit "E", these are the vouchers, are they not?

A. Yes.

Q. Are there any vouchers to that?

A. Sometimes they don't give it to you, just give the bill.

Q. Well, is there any of this Camsalide on any of those vouchers? I've been unable to find any on any of the vouchers.

A. That's the only one here.

Q. But there's no voucher for it?

A. They don't give it.

Q. But you got those vouchers here; so that those vouchers are not complete?

A. Well, they give you a bill or a voucher, one or the other.

Q. You bought some of that same Camsalide Tablets after July, and they are not in that book?

A. After July 21st?

Q. Yes; on August 29th; why haven't you got that in there?

A. My attorney had this book all the time; when this slip come back I enter it again.

Q. Well, there's two purchases that come from

(Testimony of Peter Young.)

the Honolulu Medical Supply; one on January 1th and one on April 15th, 1939, of 500 each; why aren't they in there?

A. What date have they got there? [346]

Q. January 16th and April 15th, 1939; of 500 each; why aren't they in there?

A. Let me see that record.

Q. These are the records right from Honolulu Medical Supply; I checked the dates yesterday morning, if you have any question about it; January 16th, 500, and April 15th, 1939, 500.

A. If not on the voucher I have it on the slip which I have in the office.

Q. Well, those are before July of this year; why aren't they on that page?

A. Well, if I didn't buy any they couldn't be there.

Q. Well, if you did buy any they should be here, shouldn't they?

A. Let's see those vouchers. (Clerk hands documents to the witness). I got the bill here on January 16, 1939.

Q. You got the bill; and how many tablets?

A. 500.

Q. But it isn't in this book?

A. Well, they forget to enter; you can't get perfect bookkeeping.

Q. Now can you find one for April 15th, 1939? That isn't in here either.

(Testimony of Peter Young.)

A. Well, sometime it slip your mind when you're awfully busy, to enter.

Q. But they aren't in this book?

A. It should be, though.

Q. But they are not?

A. When a thing comes in, especially when the office girl receives the thing and she doesn't say anything when it comes in, then is when you forget about it. [347]

Q. Well, even that record isn't an accurate record at all?

A. Well, it's as accurate as I can make it; you can't remember everything; even your record is not accurate; you got cough syrup how many gallons I bought, I think you put down 40; I bought maybe 100 gallons.

Q. Well, you see I'm just limited to what I can check up.

A. Well, I bought about 40 gallons from Upjohn, and you never put one gallon, you just think of Paregoric, but my cough syrup override that Paregoric.

Q. Well, we're not interested in that thing.

A. Why are you so much interested in Paregoric; other doctors dose a lot of patients, Chinese; they cough, they got chronic bronchitis—

Q. Most of your patients are old Chinese, aren't they? A. Sure.

Q. Most of them are sixty or seventy years old?

(Testimony of Peter Young.)

A. — Yes.

Q. And they came over here years ago as plantation laborers, didn't they?

A. A lot of them they are practically in their seventies and eighties; a lot of these doctors say, "You know you have all the old Chinese practice, influential Chinese"; and that's true.

Q. And isn't this true, that practically all of those old Chinese came over to the Territory of Hawaii addicted to the use of smoking opium; isn't that right?

A. That I don't know.

Q. And it's that class of trade that's just flocking to your office to get Paregoric and these exempt preparations?

A. No; I diagnose their case and I administer if necessary. [348]

Q. You mean you diagnose their case so that you can put something down in the record; you know what's the matter with them, don't you?

A. Sure, they got shortness of breath and a cough; I treat that shortness of breath with alcohol and camphor, and the cough with cough syrup.

Mr. Moore: That's all.

Mr. Esposito: No questions. We rest, if the Court please.

The Court: The defense rests. Any rebuttal?

Mr. Moore: We rest, Your Honor.

The Court: The prosecution rests.

Mr. Esposito: If the prosecution rests, just for the protection of the record on my present motion Your Honor—

Mr. Moore: I have no objection, it may be renewed in the same form that you gave it before.

Mr. Esposito: And, Your Honor, because the defense introduced some evidence, I understand the Federal rule is that a motion for a directed verdict at the close of all the evidence must be repeated. Therefore, I now move the Court that the Court instruct the jury to return a verdict for the defendant on all the counts charged in the indictment, for the reason that (1) said indictment and the evidence adduced fails to prove that the defendant is guilty of any offense against the United States of America; (2) or that said indictment and all its counts is and are insufficient in law; (3) this is the reason that I didn't move yesterday, Your Honor, it slipped my memory, that Sec. 6 of the Harrison Anti-Narcotic Act does not make it a crime for failure to keep records of exempt drugs, and if it does, Your Honor, by interpretation or by construction, said Sec. 6 of the Harrison [349] Anti-Narcotic Act or that part is invalid inasmuch as it is unconstitutional in that it regulates the practice of medicine; that said Sec. 6 of said statute is indefinite and ambiguous; that said Sec. 6 is a tax measure exempting certain drugs as alleged in all the counts from taxation and the provisions of the Act if the alleged enumerated conditions of the said section are complied with; that if any of the condi-

tions are not complied with, then said exempt drugs become taxable and the provisions of the Act apply. And lastly, Your Honor, that said Sec. 6, if it is so interpreted to mean that it charges an offense or a crime against the United States as alleged in the indictment, is further invalid and unconstitutional because it infringes upon the police powers of a state or a territory in that it regulates or attempts to regulate the practice of medicine; and further, because of its ambiguity, indefiniteness and uncertainty it violates the "due process" clause of the Constitution, of the Fifth Amendment and other provisions of the United States Constitution. And for these reasons, Your Honor, we move that the Court peremptorily and absolutely direct this jury to return a verdict in favor of the defendant that he is not guilty of any and all of the counts alleged in this indictment.

The Court: The motion is denied.

Mr. Esposito: Your Honor, for the reasons stated may we reserve an exception to the Court's ruling.

Mr. Moore: Inadvertently I overlooked putting in this narcotic record that counsel turned over to the narcotic officers, and I'll now ask that the case be opened for the purpose of admitting that in evidence.

Mr. Esposito: No objection. [350]

The Court: The case is opened for the purpose of receiving that record. What is that record?

Mr. Moore: That's the Doctor's narcotic record, produced and given to Mr. Barthelmess on the date of inspection in the month of July of this year.

(Marked "U. S. Exhibit No. 3")

The Court: Is the prosecution ready with instructions?

Mr. Moore: Yes, Your Honor.

The Court: Is the defense ready?

Mr. Esposito: Your Honor, I will be, this afternoon about 1:30 or 2:00 o'clock; they're being typed now, Your Honor.

Mr. Moore: Well, can't we get started on what you have already, shortly after one?

Mr. Esposito: I'd like to promise Your Honor, but I'm not certain; I wouldn't want the Court to come here and then maybe I'd be late; if we make it 1:30 I'll have some of them.

Mr. Moore: 1:30 is agreeable with me.

The Court: I assume that there will be a considerable argument about instructions?

Mr. Esposito: Yes, Your Honor, I so anticipate.

The Court: We had a session of that yesterday that took longer than the estimate; I think that it would be the best to excuse the jury until tomorrow morning; I don't want to send the jury out about half past three or four o'clock. Any suggestions in connection with that thought?

Mr. Moore: I think that that probably would be the most expeditious and would leave these men so they can take care of their business affairs this.

afternoon, so that when we come in here tomorrow morning to proceed with the argument and the giving of the instructions in this case we will not [351] waste any more of the jury's time than absolutely necessary.

Mr. Esposito: That's agreeable to the defense, Your Honor.

The Court: All right; the jury is then recessed until nine o'clock tomorrow morning. Remember the hour, nine o'clock. Remember, gentlemen, the statement I made to you yesterday by way of caution and admonition about your duties, to keep an open mind free from any possible influence except the evidence in the case; you haven't heard all the case yet; there will be the instructions of the Court as to the law; there will be the argument of counsel as to perhaps the facts and their reasoning. I should prefer that you don't discuss it amongst yourselves until you get the entire case before you; you'll have plenty of time for deliberation then. The Court is recessed until nine o'clock tomorrow morning. We will take up the instructions at what hour?

Mr. Moore: One-thirty, Your Honor?

Mr. Esposito: One-thirty.

(Adjourned—12:01 p. m.)

In Chambers 1:30 p. m.

(The Court, the Clerk, and opposing counsel appear for the settling of instructions. Upon

appearance, the Official Court Reporter is informed by the Court that his presence is not required.)

September 14, 1939 . 9:11 a. m.

Mr. Moore: Ready for the United States, stipulate the jury is present.

Mr. Esposito: Ready for the defense, Your Honor; stipulate the jury is present.

The Court: You may then proceed with the argument: [352]

Mr. Moore: (Opening argument).

Mr. Esposito: (Argument).

Mr. Moore: (Closing argument) . . . This man got 72 gallons of Paregoric—

Mr. Esposito: Your Honor, we object to this as going beyond the issues of this case, as to the amount of drugs; I think that was understood as not a part of the issue; we object to this line of argument.

The Court: That's set out in Count Three of the indictment, the quantity of Paregoric.

Mr. Esposito: Your Honor will allow me an exception.

The Court: Yes.

Mr. Moore: (Concluding argument).

The Court: To counsel I'll say that there has been so much discussion of the functions of the Court and the jury that instruction No. 1 is either withdrawn or refused.

(The Court reads the instructions)

(No. 9) . . . "and a record is kept of the sale in the manner indicated in Article 185", excerpts of which were just read to you.

Mr. Moore: With reference to the instruction just preceding this, there's one requirement there that should not be in here, "registration number of recipient"; that is only with reference to registered dealers; the one with the consumers just leaves that out; if you'll delete that particular one.

The Court: Repeating, then,—

Mr. Esposito: Your Honor, we have an objection to any comment on the instructions; he's had his day in court yesterday afternoon; His Honor has ruled on both sides, and [353] he's bound, if Your Honor please, by the instructions as given by the Court.

The Court: I stand ready to hear a statement of inadvertence or oversight or typographical or other error in instructions.

Mr. Moore: It's just the words after "(2)", Your Honor.

The Court: Now you wish to modify your instruction number five by deleting the third line from end, the words following the bracketed two, relating to "registration number of recipient"?

Mr. Moore: Yes.

Mr. Esposito: Will Your Honor allow me an exception to the Court's ruling on the amendment of instructions.

The Court: Exception is noted. So that there may be no confusion about the matter, the Court

will again read the instruction which precedes the one just read. (The Court reads instruction No. 5 as amended, and continues to a conclusion the reading of the instructions).

The form of verdict that will be given to you includes a place for your finding on each of the eight counts before you. You will find as to each count either "Guilty" as charged or "Not guilty". When you retire to the jury room you will select from among your members a foreman to see that votes are taken and properly counted and to sign and return your verdict into court.

If counsel had some exceptions now——

Mr. Esposito: Yes, if Your Honor please. At this time the defendant, if Your Honor please, takes exception to the Court giving over objection of the defendant the Government's requested instructions numbers 3-A, 4, 5, 6, 7, to the jury [354] in its instructions and charge. Also, the defendant takes exception to the Court's decision in refusing to give to the jury in its charge and instructions the defendant's requested instructions numbers 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 23, and 25, for the reasons stated.

The Court: The jury is now under custody of the Marshal——

Mr. Moore: We should swear the Bailiff, Your Honor.

Clerk: I'll swear the Bailiff, then, Your Honor?

The Court: Oh, you swear the Bailiff?

Mr. Moore: Yes, Your Honor.

(Two Bailiffs are duly sworn)

The Court: The form of the verdict is here (handing to the clerk the said document).

Clerk: Do you want me to give a copy of the instructions to the jury, or just the verdict and the indictment until they ask for it?

The Court: Just the verdict, not the indictment; I don't even give them the indictment.

Clerk: Just as they ask for it?

The Court: Yes.

(Jury retire—10:30 a. m.)

(Jury return to courtroom—12:05 p. m.)

The Court: Who is the foreman of the jury?

Mr. White: I am, Your Honor.

The Court: Have you a verdict to return to the Court?

Foreman: We have, Your Honor.

The Court: - Pass it to the Clerk, please.

(Clerk receives verdict from Foreman and hands it to the Court.)

The Court: The Clerk will read the verdict.

[355]

(The Clerk reads the verdict.)

Mr. Esposito: Your Honor, at this time we except to the verdict of the jury on all counts because it is contrary to law and contrary to the evidence.

The Court: Exception noted. Defendant, upon the verdict rendered by the jury the Court ad-

judges you to be guilty on Counts 3, 4, 5, 6, 7, 8, 9 and 10.

Mr. Esposito: Your Honor, we take exception to the Court's judgment here, and give notice of motion for a new trial.

The Court: When will the defendant be ready for sentence?

Mr. Esposito: Your Honor, may we have until some day next week?

Mr. Moore: That's perfectly all right with me.

The Court: What day?

Mr. Esposito: Well, Your Honor, about a week or ten days, so that I can look up the citations on a motion.

Mr. Moore: Say, Thursday morning, nine o'clock.

The Court: At nine o'clock Thursday, September 21st. The defendant is at liberty under bond?

Mr. Moore: He has a continuing bond, Your Honor.

The Court: And the bond may continue, then.

September 21, 1939—9:15 a. m.

For Hearing on Motion for a New Trial

Mr. Esposito: May I proceed, Your Honor?

The Court: Yes.

Mr. Esposito: If the Court please, I don't intend to take very much of the time of the Court, but so that I may have a brief resume of these dif-

ferent methods that I have [356] brought up in the alleged assignment of errors, we really have one issue here, one question of law, but courts have interpreted this one issue of law, some in the affirmative way, and others in the negative way, so that I collected or completed about seven reasons why this indictment is insufficient in law and fatally defective. Your Honor recalls that I have three requested direct instructions; one was a motion at the end of the Government's case; then after putting on the defense, again I made a motion for a directed verdict at the end of all the evidence adduced; then my first requested instruction in chambers for the directed verdict; naturally that brings three different methods of attacking the same deficient indictment with the weight of the evidence, as a question of law, Your Honor. So that we claim that the Court erred in overruling these three different motions for requested directed instructions, wherein we requested the Court peremptorily to instruct the jury to return a verdict of "Not guilty" and to discharge the defendant. The reasons, Your Honor, we will enumerate:

(1) That the facts set forth and alleged in the indictment and in any and every count thereof fail to state facts sufficient to show that the defendant has violated any law of the United States of America, or that the defendant is guilty of any crime or offense, or that the defendant has violated any of the requirements or provisions of the so-called Harrison Anti-Narcotic Act, also known as the Act

of Congress of December 17, 1914, and its three subsequent amendments, and that therefore every count of the indictment is fatally defective; further, that each and every count of the indictment affirmatively alleges and the evidence [357] affirmatively shows that the defendant did not violate any law of the United States of America and did not violate Section 6 nor Section 9 of the aforesaid Act or its amendments.

(2) Assuming that if said facts as stated and alleged in each and every count of the indictment are within the requirements and provisions of said Section 6 and Section 9 of the said Act, which sections are also known as Section 1041 and Section 1047 of Title 26, United States Code Annotated, then to that extent of the assumption and to that interpretation of Section 6 and Section 9 the said Harrison Anti-Narcotic Act and its amendments are invalid and unconstitutional because it is in violation of Article 10 of the Amendments of the United States Constitution, in that said Section 6 and Section 9 are an attempt by Congress to exert powers not delegated to it, Congress, by the United States Constitution and its Amendments; further, that said Section 6 and Section 9 of said Act, as interpreted by the Court, are an infringement upon and a violation of the police powers as granted to every State and the Territory of Hawaii by the United States laws, in that it is a regulation of the practice of medicine affecting and appertaining to

physicians and surgeons and therefore unconstitutional.

(3) That said Section 6 of said Act, as interpreted and ruled by the Court, is inconsistent with and contrary to Section 2-A of the said same Act of Congress of December 17th, 1914, and its amendments, in that the said Section 6 of said Act fails to provide for the exception, of keeping records of narcotic drugs dispensed by a physician, dentist, veterinary surgeon, of Section 2-A, "such as may be dispensed [358] or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend", and as is excepted by the provisions of said Section 2-A of the said Act, of the so-called Harrison Anti-Narcotic Act, and therefore the said Section 6 as interpreted by the Court is invalid and unconstitutional for the reason that said Section 2-A of said Act has already been declared valid and constitutional by the United States Supreme Court in at least five decisions.

(4) That said Section 6 and Section 9 of the said Act are a violation of the "due process" clause of the United States Constitution and its Amendments in that it is a statute or Act which forbids or requires the doing of an act in terms so vague, indefinite, uncertain, and ambiguous that men of common intelligence must necessarily guess at the meaning of the Act and differ as to the application thereof. In this case, Your Honor, we say that the defendant is a man of common intelligence; in in-

interpreting the Act he honestly assumed that the exception of Section 2-A, to-wit, that when a doctor gives medicine to a patient in the honest practice and course of his profession, without any intent to evade the Act, that under the exception of personal attendance he didn't have to keep records. Now, if this same Harrison Anti-Narcotic Act gives an exception and privilege to a doctor when he prescribed in the raw state Morphine, he assumed that Section 6, in his interpretation, also provides the same exception. If this Act gives a doctor the exception and privilege not to keep a record when used in personal attendance in distributing the raw Morphine, Opium, [359] or Cocaine, which is greater than the exempt drugs, he assumed in his interpretation that the personal attendance exception applied to Section 6; and because of the ambiguous and non-specific provision of the statute it is uncertain and therefore a violation of the "due process" clause of the law, that this man is deprived of the privilege granted to every doctor by Section 2-A of the statute, and here, by the interpretation of the Court that there is no exception to Section 6 in regard to personal attendance, he is deprived of this right granted by Section 2-A, by the interpretation of Section 6, and because of the ambiguity, uncertainty and vagueness that would be a violation of due process.

(5) That the said Section 6 and Section 9 of the same Act do not constitute or make an offense or crime against the United States of America the

mere failure to keep a record of exempt drugs which are dispensed as medicines and not with the intent to evade the provisions of the Act by a physician who was duly licensed and registered to practice medicine and who has paid his Federal narcotic tax fee according to law, when the said exempt drugs, according to law, are dispensed and distributed by said physician in good faith to patients as medicine in the course of his professional practice only, as the evidence adduced by both parties discloses that the defendant did, and as alleged in all the counts of the indictment.

(6) That, assuming the most favorable interpretation, with all its reasonable attending inferences, to the evidence adduced by the United States Government against this defendant, yet the hypothesis of innocence of this defendant applies to all the evidence, and the defendant [360] should be discharged as a question of law.

(7) And, last, if Your Honor please, that the intent and purpose of the legislators, that is, the members of the houses of Congress, in enacting Section 6 of the Act of Congress of December 17, 1914, and its subsequent amendments, was to exempt certain drugs which contained small amounts of opium or its derivatives, which amounts are enumerated specifically in said Section 6, from taxation, the exemption in Section 6 saying that if a doctor in good faith prescribes any drug that has less than two grains of opium to the fluid ounce,

that has less than one grain of morphine to the fluid ounce, that has less than one-eighth of a grain of heroin to the fluid ounce, or less—I mention opium, morphine, heroin, I think those are the three exceptions, Your Honor,—

Mr. Moore: And cocaine.

Mr. Esposito: Not in the exemptions; there's nothing on cocaine; it's just opium, morphine, and heroin; so long as these exempt drugs—

Mr. Moore: Do you mean exempt drugs, Doctor?

Mr. Esposito: Yes, exempt drugs.

Mr. Moore: Oh; one grain of cocaine to the ounce.

Mr. Esposito: And one grain of cocaine. Now, there's no question on the facts, Your Honor, that all these drugs alleged in all these counts are exempt. (Argument) . . . And we submit, Your Honor, that upon these alleged assignments of error that this defendant should be granted a new trial or discharged peremptorily because of the fatally defective indictment and the evidence. We submit our motion.

The Court: You made your points perfectly clear to me. [361]

Mr. Esposito: Thank you, Your Honor.

The Court: I think you've presented your contentions well. The Court doesn't agree with your construction of the Act and is quite satisfied that the indictment does in good form set out a violation of the law.

The motion for a new trial is denied.

Mr. Esposito: And, Your Honor, for the reasons stated, may we be permitted an exception to protect our record.

The Court: Noted.

Mr. Moore: This is for the matter of sentence at the present time, Your Honor.

The Court: Yes, this is the time.

Mr. Esposito: Your Honor, may I ask to enter the name of Mr. Hiram Fong to being associated with me at this time.

The Court: Let the record so show.

Mr. Moore: (Argument, and recommendation as to sentence).

Mr. Esposito: (Argument).

Mr. Moore: (Argument in rebuttal).

Stand up, Doctor Young.

(Defendant rises).

The Court: It is the judgment and sentence of the Court that, on your conviction on Count Three of the indictment, you pay a fine of \$2,000.00; and in addition you are sentenced to two years imprisonment on that Count; the sentence of imprisonment is stayed for a period of Five Years, during which time you will be on probation. As to the Counts Four to Ten, inclusive, sentence is suspended for a term of Five Years. The costs are remitted.

Mr. Moore: The probation conditioned on payment of the fine, Your Honor?

The Court: Yes. [362]

Mr. Moore: And that's under Rule 131 of this Court?

The Court: Yes, that I should have mentioned; the condition of the probation is that the fine be paid.

Mr. Moore: And may the narcotic officers that are probation officers with this Court be the probation officers of this defendant?

The Court: Is there no regularly appointed and distinct probation officer?

Mr. Moore: In practically every district of the United States they have a regularly designated probation officer, but they do not have one in this district, and because of that this Court has appointed by, I think, an order outstanding, that with reference to the narcotic cases, that the narcotic officers will act as probation officers in those cases, the officers of the Alcohol Tax Unit in those cases, and in other cases the United States Marshal's office.

The Court: The Narcotic agency has a chief—what is it?

Mr. Moore: Mr. C. T. Stevenson.

The Court: What is his title?

Mr. Moore: He is the District Supervisor, Bureau of Narcotics, District of Hawaii.

The Court: Very well; for this particular defendant the Supervisor of the Narcotic Division of the Treasury Department, located here in Honolulu, is made probation officer, to whom you will be responsible.

Mr. Esposito: Your Honor, may we note an exception to these probation officers, seeing that they are the same narcotic agents that have investigated this defendant and already have jurisdiction over him; I think, to make this exception when other defendants are put under probation of [363] regular probation officers or the clerks would kind of create an animus.

The Court: Well, I'm not making the entire force probation officers, but only the head of that division or department, that agency.

Mr. Moore: And his successors in office?

The Court: Yes; in making it the head I haven't named any individual. Mr. Moore says the present head is Mr. Stevenson; instead of naming Mr. Stevenson, it's the intention of the Court to name the officer whose position is now filled by Mr. Stevenson.

Mr. Esposito: If Your Honor please, at this time the defendant takes exception to the judgment and sentence and fine of this Court as just rendered, and we move Your Honor for a stay of mittimus as to the payment of this fine and as otherwise adjudged by the Court pending a 48 hour time so that he can file a proper bond for supersedeas and cost bond; that, Your Honor, we are now giving notice that the defendant intends to appeal to the Ninth Circuit Court of Appeals under the law.

Mr. Moore: At this time, may it please the Court, I move that the combined bail and supersedeas bond be set in the sum of \$2,500.00; the fine

is \$2,000.00, and that's only \$500.00 above that.

Mr. Esposito: Is the cost bond—

Mr. Moore: Well, the cost bond is \$500.00; that's a different bond altogether; this is the combined bail and supersedeas bond.

The Court: That seems a reasonable amount to me, and the Court fixes that amount as a supersedeas bond. [364]

Mr. Esposito: And, Your Honor, may the sentence and fine and mittimus be stayed 48 hours, so I may file the proper bonds?

Mr. Moore: I have no objections to that, Your Honor.

The Court: Granted.

Mr. Moore: It's with the understanding that the present bond remains in force.

Mr. Esposito: Oh yes.

The Court: What is the present bond?

Mr. Moore: The present bond is \$1,500.00, Your Honor, and it is conditioned to perform the judgment.

The Court: All right; 48 hours, then. You better file that notice of appeal in writing.

Mr. Esposito: I'll file that this afternoon, Your Honor, in writing.

I hereby certify the foregoing to be a full and accurate transcript of my shorthand notes taken in the above entitled proceeding.

(Signed) OLAF OSWALD,

Official Court Reporter. [365]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON APPEAL.**

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 365 inclusive are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that I am attaching hereto the original citation on appeal and that the costs of the foregoing transcript of record are \$56.15 and that said amount has been paid to me by the appellant.

In testimony whereof, I have hereto set my hand and affixed the seal of said court this 24th day of January A. D. 1940.

[Seal] WM. F. THOMPSON, JR.,

Clerk

U. S. District Court,

Territory of Hawaii. [366]

[Endorsed]: No. 9436. United States Circuit Court of Appeals for the Ninth Circuit. Peter Young, alias Young Lup, Appellant, vs. United States of America, Appellee. Transcript of Record.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed January 31, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

/ In the United States Circuit Court of Appeals
for the Ninth Circuit
San Francisco, California

No. 9436

PETER YOUNG alias YOUNG LUP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED ON APPEAL; DESIGNA-
TION THAT RECORD BE PRINTED IN
ITS ENTIRETY.

To the Honorable Paul P. O'Brien,
Clerk of the above entitled Court:

Sir:

Please be advised, that Peter Young alias Young Lup, Appellant in the above entitled cause, hereby adopts and claims each and every one of the Assignments of Error, to wit, No. 1-29 inclusive, that

appear in the certified typewritten transcript of the Record, filed and docketed in the above entitled Court, as the points upon which he intends to rely on the Appeal in the above entitled cause; and that the Appellant further designates his desire, that the said record as certified, filed and docketed as above mentioned be printed, in its entirety.

Dated: Honolulu, T. H., this 7th day of February, 1940.

PETER YOUNG alias
YOUNG LUP,

Appellant,

By JOSEPH V. ESPOSITO,
HIRAM L. FONG,

His Attorneys.

Receipt of a copy of the within is hereby acknowledged this day of February, 1940.

I. M. STAINBACH,

United States Attorney of the
District Court of the Territory
of Hawaii.

[Endorsed]: Filed Feb. 20, 1940. Paul P.
O'Brien, Clerk.

No. 9436

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER YOUNG, alias YOUNG LUP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court of the United States
for the Territory of Hawaii.**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, November
25, 1940.

Before: Garrecht, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr.
Jos. V. Esposito, counsel for appellant, and by
A. J. Zirpoli, Assistant United States Attorney,
counsel for appellee, and submitted to the court for
consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, March 17,
1941.

Before: Garrecht, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

By direction of the Court, Ordered that the type-
written opinion this day rendered by this Court in
above cause be forthwith filed by the clerk and that

a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Territory of Hawaii

OPINION .

Before: Garrecht, Haney and Stephens,
Circuit Judges.

Stephens, Circuit Judge.

Appellant, to whom we shall hereinafter refer as defendant, was convicted of violation of the Harrison Anti-Narcotic Act [26 U.S.C.A. §§1041 and 1047, U. S. Internal Revenue Code §§2551 and 2557]. The indictment contained ten counts, two of which were dismissed upon motion of the defendant. The jury brought in a verdict of guilty upon each of the remaining eight counts, and the present appeal is from the judgment rendered in pursuance of said verdict.

The counts of the indictment are substantially the same, the only difference being that they charge dispensation of different amounts and kinds of drugs. All drugs alleged to have been dispensed contain opium, but less than two grains per fluid ounce. Count III charges that the defendant,

“a physician who had duly registered and paid his special tax, as required by law, and who is

entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than two grains of opium in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away seventy-two (72) gallons and four (4) pints of a preparation and remedy which did not contain more than two grains of opium in one fluid ounce, to-wit: paregoric, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such paregoric which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the

peace and dignity of the United States of America."

Twenty-nine alleged errors are assigned by defendant, which fall into two general groups. The first group relate to the sufficiency of the indictment and the evidence presented in support thereof, and the second group relate to the Court's charges to the jury.

Defendant urges that failure of a physician to keep a record of his dispensation of non-taxable preparations is not a crime against the United States. We quote from his opening brief:

"* * * such failure * * * is * * * but a violation of condition precedents of the Statutory provisions, the fulfillment and compliance of which conditions precedent would render said exempt narcotics non-taxable, and therefore exempt, *that the mere failure to comply with the conditions precedent, as alleged in all the counts of the Indictment destroys the privilege or exemption of taxation and subjects said exempt drugs to the tax of said Act as provided in Section 1 of the Act, and that the said exempt drugs become taxable in the same respect as the heroic or true narcotics, because the defendant merely failed to keep written records of the dispensations of said exempt drugs.*" [Italics the defendant's.]

For a clear understanding of defendant's position we summarize or quote the applicable sections of

the Act [section numbers refer to U. S. Internal Revenue Code]:¹

Section 2550 provides for a tax on designated narcotics sold in the United States.

Section 2551 is entitled "Exemptions", and provides,

"The provisions of this subchapter * * * shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium * * * in one fluid ounce * * *: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter * * *: Provided, further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct. Such record shall be preserved for a

1. For convenience all of our quotations herein are from the new United States Internal Revenue Code, instead of from U.S.C.A. Title 26 as it existed at the time of the alleged commission of the acts. The changes in the wording of the sections are immaterial to the issues of the instant case.

period of two years in such a way as to be readily accessible to inspection * * *, and every such person so possessing or disposing of such preparations and remedies shall register * * *."

Other exemptions are contained in section 2551, which are not material to the case before us.

Section 2553 provides in subsection (a) that it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package. Subsection (b) of section 2553 contains an exception in the case of registered practitioners, and reads, so far as here applicable,

"The provisions of subsection (a) shall not apply * * * (2) To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed or given away."

Section 2554 provides that it is unlawful to sell, exchange or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold,

bartered, exchanged or given, on a form issued in blank for that purpose by the Secretary.

Subsection (c) of section 2554 contains exceptions, and reads,

“Nothing contained in this section, section 2563 or section 2564 shall apply (1) To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only; Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.”

Section 2555 contains a general requirement that every person liable to any tax imposed by the Act shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Secretary may from time to time prescribe.

Section 2557 provides that any person who violates or fails to comply with any of the require-

ments of the Act shall, upon conviction, be fined or imprisoned, or both.

Defendant's argument runs somewhat as follows: Section 2551 provides for exemptions from the application of the taxing act, but contains conditions precedent to obtaining that exemption. That the keeping of records is a mere condition precedent, hence failure to keep records merely subjects one selling otherwise exempt narcotics to the main provisions of the Act. From here he argues that the main provisions of the Act grant a physician the privilege of dispensing narcotics if said dispensation is in good faith or in the course of his professional practice only, and that a physician so dispensing narcotics to a patient upon whom he shall personally attend need not keep a record of the drugs dispensed. The argument then follows that since the indictment did not negative these exemptions it is fatally defective.

We pass without deciding the question of whether the indictment would be fatally defective for failure to negative exemptions if defendant's premise as to the construction of the statute were correct [but see *Stetson v. United States*, 257 Fed. 689 (CCA Mich. 1919) and *Walker v. United States*, 79 Fed. (2d) 269, 270 (CCA 8, 1935)], for we are of the opinion and hold that defendant's first premise is incorrect, and with it falls his entire argument.

It is clear from an analysis of the entire Act that Congress did not intend the requirement of keep-

ing records set forth in section 2551 as a mere condition precedent to exemption from the remaining terms of the Statute.

For convenience we shall refer to the narcotics described in section 2551 as "exempt preparations".

First, it is provided that these "exempt preparations" do not fall within the provisions of the Act "Provided that such remedies and preparations *are manufactured, sold * * ** as medicines and not for the purpose of evading the intentions and provisions" of the Act. This is clearly by its very wording a condition precedent. In order to be exempt even though they contain a limited amount of narcotics, they must be sold, etc. as medicines only. Then comes the provision relied on by the defendant, couched in entirely different language, "Provided, further, that any * * * vendor (including dispensing physicians) of the preparations and remedies mentioned in this section * * * *shall keep* a record of all sales". We hold that this is an affirmative requirement that all vendors of "exempt preparations", including dispensing physicians, must keep the record referred to.

Furthermore, section 2555 contains an affirmative requirement that all persons liable to any tax imposed by the Act shall keep records prescribed by the Secretary. If, as defendant argues, failure to keep the records prescribed in section 2551 merely subjects him to taxation and the main provisions of the Act, then he is subject to section 2555.

Section 151.2 of the Treasury Department Regulations issued under the Harrison Anti-Narcotic Act defines "exempt preparations" to mean remedies which do not contain more than two grains of opium in one fluid ounce [other "exempt preparations" defined are immaterial to the cause before us].

Section 151.185 provides

"Every manufacturer, producer, compounder or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers.

* * * The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery * * *".

Since the indictment charged that the defendant dispensed and sold the described exempt preparations and that he failed to keep a record of his dispensations, we hold that there was no insufficiency therein.

All of the defendant's arguments as to the insufficiency of the evidence to sustain the conviction, and nearly all of defendant's second group of alleged errors, are premised upon the assumption that a registered physician has a right and privilege to dispense any and all narcotics as medicines in good

faith to a patient upon whom such physician shall personally attend, without the necessity of keeping a record thereof. Our ruling above that there is no such privilege as to exempt preparations disposes of these assignments of error.

Error is assigned in the Court's instructing the jury that "ignorance of the law is no excuse". It is urged that there was no evidence presented to support the instruction and that it was hence prejudicial to the rights of the defendant. We do not agree. Defendant maintained at the trial that it was not necessary for him, a registered physician, to keep a record of dispensations of exempt drugs to patients upon whom he was in personal attendance. In this circumstance it was proper for the Court to charge the jury that the defendant's mistake as to the necessity of keeping records was no excuse for the omission.

The Court instructed the jury on the law of circumstantial evidence, and this is assigned as error. It is urged that there was no circumstantial evidence in the case and hence no necessity to give any instruction in this respect. The law was properly stated, and while this instruction was perhaps unnecessary, there was no possible prejudice to the defendant resulting therefrom.

The defendant at the trial requested that the Court instruct the jury that in a criminal case the burden of proof never shifts to the defendant and remains upon the United States throughout the

case to prove the guilt of the defendant; and that each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged before he can consent to a verdict of conviction. The refusal to give the requested instructions is assigned as error.

We hold that there was no error here for the reason that the Court adequately instructed the jury in this regard. The instruction given adhered closely to standard approved instructions upon the subject matter treated and need not be here recited. The defendant cannot complain that the Court refused to duplicate instructions in slightly different terminology.

Defendant finally urges that to give the Act and Regulations the interpretation to require a physician to keep records of his dispensations of exempt drugs in good faith to patients upon whom he is in personal attendance, would render the Act unconstitutional as an attempt by the Federal Government to regulate the practice of medicine.

We need not dwell at length upon this contention of the defendant, as this Court has previously upheld the constitutionality of the Harrison Narcotic Act against a similar attack. *Mauk v. United States*, 88 Fed. (2d) 557, and *Ratigan v. United States*, 88 Fed. (2d) 919.

The judgment of conviction is Affirmed.

[Endorsed]: Opinion. Filed Mar. 17, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9436

PETER YOUNG, alias YOUNG LUP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon appeal from the District Court of the
United States for the Territory of Hawaii

This cause came on to be heard on the Transcript
of the Record from the District Court of the United
States for the Territory of Hawaii and was duly
submitted.

On Consideration Whereof, It is now here or-
dered and ~~adjudged~~ by this Court, that the judg-
ment of the said District Court in this Cause be,
and hereby is affirmed.

[Endorsed]: Filed and entered March 17, 1941.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, April 21,
1941.

Before: Garrecht, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

**ORDER DENYING PETITION FOR
REHEARING**

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed April 14, 1941, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. Herbert Chamberlin, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including May 24, 1941; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until

after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT

United States Circuit Judge

Dated: San Francisco, California, April 21, 1941.

[Endorsed]: Filed Apr. 21, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Three Hundred Forty-seven (347) pages, numbered from and including 1 to and including 347, to be a full, true and correct copy of the entire record excluding original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of April, 1941.

[Seal]

PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

(7486)